

LIBRARY  
SUPREME COURT

VOLUME 2

# TRANSCRIPT OF RECORD

---

Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

---

RALPH BERGER, PETITIONER,

vs.

NEW YORK.

---

ON WRIT OF HABEAS CORPUS TO THE COURT OF APPEALS OF NEW YORK

---

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1966

CERTIORARI GRANTED DECEMBER 2, 1966

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 615

RALPH BERGER, PETITIONER,

vs.

NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

## INDEX

### VOLUME 2

Original Print

Record from the Court of Appeals of the State of  
New York—Continued

Appendix to appellant's brief consisting of pro-  
ceedings in the New York State Courts—Con-  
tinued

Proceedings in the Supreme Court of New York  
County of New York—Continued

Transcript of trial—Continued

Testimony of William F. Reilly—

(recalled)—

direct .....	592	329
cross .....	593	330
redirect .....	608	345
recross .....	608	346

Sidney Berkowitz—

direct .....	609	347
cross .....	624	360
recross .....	646	383



Record from the Court of Appeals of the State of  
New York—Continued

Appendix to appellant's brief consisting of pro-  
ceedings in the New York State Courts—Con-  
tinued

Proceedings in the Supreme Court of New York  
County of New York—Continued

Transcript of trial—Continued

Testimony of William F. Reilly—

(recalled)—

direct ..... 652 390

cross ..... 653 391

redirect ..... 678 417

recross ..... 679 418

Anthony J. Bernhart—

(recalled)—

direct ..... 680 419

cross ..... 687 425

Henry M. Cronin—

(recalled)—

direct ..... 689 427

cross ..... 691 429

James J. Mahoney—

direct ..... 694 432

cross ..... 697 435

William F. Reilly—

(recalled)—

direct ..... 702 439

Donald C. Kirby—

direct ..... 702 440

Joseph W. Feeley—

direct ..... 707 446

Sydney Berkowitz—

(recalled)—

direct ..... 708 446

cross ..... 708 447

Frank Jacklone—

(resumed)—

direct ..... 711 449

cross ..... 712 450

Record from the Court of Appeals of the State of New York—Continued		
Appendix to appellant's brief consisting of proceedings in the New York State Courts—Continued		
Proceedings in the Supreme Court of New York County of New York—Continued		
Transcript of trial—Continued		
Testimony of Arnold J. Morton—		
(recalled)—		
redirect .....	716	453
cross .....	722	459
redirect .....	730	467
Hyman Amsel—		
direct .....	731	468
cross .....	735	472
David F. Campbell—		
direct .....	736	473
Proceedings re tape recordings received in evidence .....	738	475
Testimony of Samuel Lacter—		
direct .....	786	515
Summation by Mr. McKenna .....	828	516
Court's charge .....	843	526
Verdict .....	916	580
Motion to set aside the verdict and denial thereof .....	932	581
Sentence .....	936	583
Stenographer's Minutes (by Three Stenographers Each Separately Taking Notes simultaneously) of Proceedings Out of Jury's Presence on October 15 and 20, 1964, During Preliminary Playing of Certain Tape Records .....	937	584
Minutes by Stenographer Mickell, October 15, 1964 .....	938	585
Minutes by Stenographer Mickell, October 20, 1964 .....	964	610

Record from the Court of Appeals of the State of  
New York—Continued

Appendix to appellant's brief consisting of pro-  
ceedings in the New York State Courts—Con-  
tinued

Proceedings in the Supreme Court of New York  
County of New York—Continued

Stenographer's Minutes (by Three Stenog-  
raphers Each Separately Taking Notes si-  
multaneously) of Proceedings Out of  
Jury's Presence on October 15 and 20,  
1964, During Preliminary Playing of Cer-  
tain Tape Records—Continued

Minutes by Stenographer Mershon, Octo- ber 20, 1964 .....	986	630
--	-----	-----

Minutes by Stenographer Irwin T. Shaw, October 15, 1964 .....	1009	652
--	------	-----

Minutes by Stenographer Shaw, October 20, 1964 .....	1023	665
---	------	-----

Statement as to Opinion .....	1031	673
-------------------------------	------	-----

Notice of appeal to Court of Appeals .....	1033	674
--	------	-----

Certificate granting leave to appeal to Court of Appeals .....	1035	675
---	------	-----

Order of affirmance .....	1036	676
---------------------------	------	-----

Statement as to Opinion .....	1037	676
-------------------------------	------	-----

Certificate of Reasonable Doubt and People's Ex- hibits 1 and 2 .....	1038	677
--	------	-----

Certificate of Reasonable Doubt .....	1040	677
---------------------------------------	------	-----

People's Exhibit 1 .....	1042	680
--------------------------	------	-----

Order of Mr. Justice Sarafite .....	1042	680
-------------------------------------	------	-----

Affidavit of Jeremiah B. McKenna .....	1044	681
--	------	-----

Affidavit of Alfred J. Scotti .....	1046	683
-------------------------------------	------	-----

People's Exhibit 2 .....	1047	684
--------------------------	------	-----

Order of Mr. Justice Sarafite .....	1047	684
-------------------------------------	------	-----

Affidavit of David A. Goldstein .....	1048	685
---------------------------------------	------	-----

Affidavit of Alfred J. Scotti .....	1051	688
-------------------------------------	------	-----

Remittitur .....	1052	689
------------------	------	-----

Dissenting opinion .....	1056	691
--------------------------	------	-----

Clerk's certificate (omitted in printing) .....	1058	691
---	------	-----

Order allowing certiorari .....	1059	692
---------------------------------	------	-----

DETECTIVE WILLIAM REILLY, recalled as a witness in behalf of the People, having been previously duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct examination.

By Mr. McKenna (Continued):

• • • • •  
(Whereupon, the box, above referred to, was marked People's Exhibit 61 for identification, and the contents thereof, a reel of tape, was deemed marked People's Exhibit 61-A for identification.)

Q. Now, Detective Reilly, you testified, have you not, concerning a conversation that you overheard emanating [fol. 593] from Room 801 at 15 East 48th Street on June the 28th, 1962?

A. I did.

• • • • •  
The Court: (To the witness) Will you tell the Court and jury by what means you overheard this conversation.

• • • • •  
The Witness: Through the electronic equipment, with my own ears.

By Mr. McKenna:

Q. Were you doing anything else while you were listening with your own ears to this conversation?

A. I was recording this conversation on a tape.

Q. And did you record the entire conversation on the tape?

A. I did.

• • • • •  
Q. Is that People's Exhibits 61 and 61-A for identification?



A. Yes, it is.

Q. And actually, the reel itself is 61-A.

A. (No response.)

Mr. McKenna: I think, your Honor, it would be well to suspend at this point for cross examination of this witness, and then I will establish the chain of continuity with the next witness.

. . . . .

Cross examination.

By Mr. Brill:

Q. I think you told us, Detective Reilly, that you were one of the officers who made observations on June the 27th, 1962, in the vicinity and within the New York Hospital. Is that right?

A. That's correct.

[fol. 594] Q. And that accompanying you or in association with you on that day was Detective Finley?

A. That's correct.

Q. Now I think you also told us that you didn't hear any conversation in any of the eavesdropping that was conducted in or at telephone booths. Is that right?

A. I couldn't make out the conversation at the telephone booth.

Q. You didn't hear any of the words.

A. That's correct.

Q. And you didn't hear what was said.

A. That's correct.

Q. Now, you prepared a report, did you not, of the activities of yourself and Detective Finley and Detective Poulos, covering that day, June the 27th.

A. That's correct.

Q. And this is the report, Court's Exhibit 20 for identification, is it not (handing to witness)?

A. That's correct.

Q. Now on page 2, beginning at the bottom of page 2 and approximately three-quarters of page 3 there is contained matter which is supposed to have been a conversation overheard while eavesdropping at a phone booth. Isn't that right?

A. This conversation was overheard by other than I.

Q. Right. You didn't hear it.

A. That's correct.

Q. But you included that in your report.

A. That's correct.

Q. And you did that on the basis of some memorandum which was given to you by one of your brother officers.

A. That's correct.

Q. Now I show you Exhibit 45 for identification, and ask you if that is the memorandum on the basis of which you included in your report the alleged conversation eavesdropped.

A. I don't recall whether this is the actual memorandum that was handed to me at that time.

[fol. 595] Q. Did you ever see 45—

Mr. Brill: I withdraw that.

May I offer 45 in evidence, your Honor.

(Whereupon, the document previously marked People's Exhibit 45 for identification, was received in evidence and marked Defendant's Exhibit R in evidence.)

By Mr. Brill:

Q. Now, did I understand you to say that you didn't use this to incorporate it in that memorandum?

A. I said I couldn't recall whether these were the actual notes that I used at that specific date.

Mr. Brill: No. He testified he didn't know whether he used them in connection with Court's Exhibit 20.

Now I want to know when, if ever, before today—if he ever saw them—when he last saw them.

The Court: (To the witness) Did you ever see those notes before, sir?

The Witness: As far as I know, I never did.

Q. Are you saying now that you didn't eavesdrop on conversations emanating from Room 801 of 15 East 48th Street?

A. No. I did.

Q. You did. And may I ask whether you had the permission of Harry Steinman to do that?

Mr. McKenna: Your Honor, I object.

The Court: Sustained, as irrelevant.

[fol. 596] Q. On the 27th of June of 1962, whilst you were at the New York Hospital, did you hear several voices on that date?

The Witness: On the sixteenth floor?

Mr. Brill: Anywhere on that day.

Q. On the sixteenth floor of the premises occupied by the New York Hospital, did you hear the voices of several people?

A. At times, I did.

Q. How many people's voices would you say you heard on that day on that floor?

A. Two persons.

Q. Only two.

A. That's correct.

Q. How many people passed where you were standing on that day?

A. I haven't the vaguest idea.

Q. How many people passed in twos or threes, carrying on conversations beyond—passed where you were standing that day?

A. I haven't the slightest idea.

Q. Did you hear any of the voices, other than the two you say you heard?

A. It was only two that I was interested in.

Mr. Brill: No, no. Answer my question, please, Detective Reilly.

Q. Did you hear voices of persons other than the two whose voices you say you heard?

A. In all probability, I did.

Q. Is there any doubt about it in your mind?

A. I was unconcerned at the time.

Q. Is there any doubt about whether you heard other voices?

A. No, there's no doubt.

Q. It would be fair to say that you heard several, wouldn't it?

A. That's right.

Q. Now would your answer be the same for other parts of the building which house that hospital at 68th and York [fol. 597] Avenue, that you had heard other voices that day?

The Witness: I don't know what you mean by "other parts of the hospital", Mr. Brill.

Q. Were you in the lobby of the hospital?

A. Yes.

Q. Is that another part of the hospital?

A. Yes.

Q. Did you hear voices in the lobby, in that part of the hospital that day?

A. Yes.

Q. How many voices would you say you heard there?

A. I haven't the vaguest idea.

Q. It would be several, wouldn't it? Quite a large number. That's a busy lobby, isn't it?

A. That's correct.

Q. Now did you record in your mind each of the voices that you heard?



A. No.

Q. Did you fix an impression in your mind of other voices that you heard on that date?

A. No, I did not.

Q. Actually, you heard no conversation on June the 27th. Isn't that right?

A. No, it's not right.

Q. I thought you said that on June the 27th, that at the hospital you did not hear any conversation which Mr. Berger engaged in on the telephone. Isn't that true?

A. On the sixteenth floor I didn't hear any conversation that he engaged in.

Q. Did you say you heard some of the conversation in the lobby?

A. No.

Q. Pardon?

A. No, I did not.

Q. Then you didn't hear conversation, either on the sixteenth floor or the lobby. Isn't that true?

A. I heard conversation in the lobby at 6:10, approximately.

Q. Tell us what you heard at 6:10, approximately, in the lobby. I didn't hear conversation that was audible. I heard a voice.

Q. I see. So it's fair, then, to say that you did not hear any conversation at any time on June the 27th, 1962, any- [fol. 598] where in the hospital premises. Isn't that true?

A. No, it is not.

Q. Well, tell us where and when you heard conversation in the hospital on that date.

A. On the sixteenth floor I heard Mrs. Epstein refer to Mr. Berger as "Ralph."

Q. Now wait, Mister—I'm sorry, Detective Reilly. You knew that we were talking about Mr. Berger's conversation, didn't you?

A. Well, they were in conversation.

Q. Did you hear Mr. Berger say anything?

A. No, I did not.

Q. You didn't. So it's clear now, isn't it, that at no time, on June the 27th, 1962, you heard Ralph Berger engage in conversation and hear what he said? Isn't that so?

A. I didn't hear the words that he said.

Q. You didn't hear what he said, did you?

A. No. That isn't true.

The Court: The witness is apparently drawing a distinction between hearing a voice and making out the words, that's clear. So I believe it would be fair to state, as Mr. Brill suggests, that while you heard a voice, you did not hear the actual words.

The Witness: That's correct.

The Court: You couldn't make out the words.

By Mr. Brill:

Q. Did you make a record of what you said you heard on that date, June the 27th, at the New York Hospital?

The Witness: In reference to the lobby or on the sixteenth floor?

[fol. 599] Mr. Brill: Anywhere. Lobby or on the sixteenth floor.

A. I believe there's a record that—the word that was said on the sixteenth floor.

Q. That you heard.

A. That's right.

Q. Are you referring to Exhibit 20 (handing to witness)? Is that what you're referring to?

A. That's right.

Q. Now, did you incorporate in this record something that you say you heard on that day?

A. No. That's not in the record there.

Q. No, it isn't. So you made no record on that date or at any time with respect to the transactions on that date, as to what you heard, isn't that so?

A. That's correct.

Q. All right. Now, I think you told us that it was on June the 28th that you overheard, with your own ears, something which was transmitted—

Q. (Continuing) —something transmitted through electronic equipment. Is that right?

A. That's correct.

Q. And this was where, that you heard this? At what premises? Just give us the address.

A. Mr. Steinman's address.

The Witness: Is that what you are soliciting?

Q. No. Where you were at the time that you overheard this.

A. I was on East 48th Street.

Q. And at what number on East 48th Street?

A. I don't recall exactly. It might have been nineteen or twenty-one. I don't recall the exact address.

Q. And that is the address which you cannot now tell us, the address of the plant, right?

A. That is correct.

[fol. 600] Q. All right. How many days were you at the plant?

A. Several days. I couldn't tell exactly how many days altogether.

Q. How many days prior to June 28 were you at the plant?

A. Several times. I couldn't recall the exact number of times.

Q. Can you tell us how many days or dates you were at the plant prior to June 28?

A. Not exactly.

Q. Well, approximately, then.

A. An offhanded guess would be five or six times.

Q. Can you tell us how many hours you spent at the plant on each of the dates that you were there prior to the 28th of June?

A. No, I cannot.

Q. Can you tell us the number of hours that you were at the plant on the 28th of June?

A. Oh, I would say maybe ten or twelve hours.

Q. Without relief?

A. No, I had relief for lunch.

Q. What time did you have your relief on that date?

A. I haven't the vaguest idea.

Q. You haven't the slightest idea. So that you didn't really mean what you said when you told Mr. McKenna that you overheard all the conversation that came over on that day, did you?

A. While I was there, I overheard it all.

• • • • •

Q. There weren't. All right. At the time that you were eavesdropping on the conversation that you told us you heard on the 28th, was there a continuous flow of words?

A. Not constantly.

Q. During the time that you were listening, were there blanks?

A. Yes, there were.

Q. There were gaps?

A. Yes.

[fol. 601] Q. Times when you couldn't hear what was being said?

A. I would say yes.

Q. So that, truthfully, you would have to say you did not hear the entire conversation, wouldn't you?

A. There was conversation that couldn't be heard.

Q. And you would have to say truthfully that you didn't hear the entire conversation, wouldn't you?

A. Emanating from the office, is this what you mean?

Q. Emanating from the private office, where there was a concealed bug transmitting conversation from Harry Steinman's office.



A. Yes, there were times we couldn't hear it.

Q. Right. So that you would honestly have to say you did not hear the entire conversation?

A. That's right.

Q. All right. Now, was there a stenographer taking stenographic notes present?

A. No, there was not.

Q. Did you make stenographic notes?

A. No, I did not.

Q. Was there a tape in a reel on the tape recorder at the time that you were listening?

A. Yes, there was.

Q. Now, did you put any identification marks on that tape, the tape itself?

A. I didn't, no.

Q. Did you see anybody put any identification marks on the tape itself?

A. No, I did not.

Q. So far as you know, there are no identification marks on the tape itself, which is contained on the reel now known as Exhibit 61 for identification, isn't that right?

A. There are identifying marks on it.

Q. On the reel?

A. On the tape and reel.

Q. On the tape itself?

A. Yes, sir.

Q. Did you see them put on?

A. No, I did not see them put on.

Q. Do you know who put them on? Yes or no.

A. Somebody assigned to the investigation.

Q. You don't know?

A. That's right.

[fol. 602] Q. All right. Have you ever yourself seen these particular marks that you refer to?

A. Yes.

Q. Were there any identifying marks, to your knowledge, ever put on the tape itself?

A. Prior to our receiving tape, they are identified as a rule.

Q. You mean a blank tape is identified as a blank tape?

A. As a number.

Q. As a blank tape, nothing on it?

A. It is numbered.

Q. But there is nothing on it?

A. That's right.

Q. Apart from what you call the number?

A. That's right.

Q. So that you cannot now say that the tape which was on the recorder at the time when you were listening with your own ears is the same tape which is on this reel now known as Exhibit 61 for identification, can you, to a moral certainty? Can you?

A. Yes, I can.

Q. You can. And your answer would be based upon the fact that there was a blank tape which bore a number, is that right?

A. That's correct.

Q. Now, is that number a number which cannot be repeated or duplicated?

A. I don't believe it can be duplicated.

Q. I am asking you, it is just a stamped number, isn't it?

A. That is correct.

Q. Is there anything about that stamped number that identifies it and holds it solely for the purpose of a particular tape or can it be used on two or more tapes, truthfully?

A. It could possibly be done.

Q. Certainly. And you can't say that that didn't happen here, can you?

A. No, I cannot.

Q. All right. I will try to reframe it. You told us a little earlier that you could not to a moral certainty say that the tape which is on that reel now, Exhibit 61-A for identifica-

[fol. 603] tion, is the same reel on which there was a tape being recorded at the time when you listened with your own ears, isn't that true?

A. No, I didn't say that.

Q. What did you say?

A. This tape here, I have heard subsequent to the original recording.

Q. When?

A. Oh, within the last week or so.

Q. Where?

A. In the offices of the District Attorney.

Q. How many times did you hear it recorded, played?

A. Maybe three or four times.

Q. And who played it for you?

A. I played it myself.

Q. Three or four times?

A. That's right.

Q. You had it in your possession at the time?

A. My possession and possession of other detectives who were working on this case.

Q. And at that time, when you played it, you played it three or four times on three or four separate days?

A. That's right.

Q. Pardon.

A. Yes, sir.

Q. When was the last time you played it?

A. I believe that was on Thursday or Friday of last week.

Q. For yourself in the District Attorney's office?

A. That's right.

Q. And at that time did you make some notes?

A. No, I did not.

Q. You didn't. You had a— Did you operate the machine at that time?

A. Yes, with another detective.

Q. No. Did you do it? Did you operate the controls?

A. No, not that particular day, no.

Q. At the time when you heard the tape played last week in the District Attorney's office, did someone else operate the controls?

A. Yes.

Q. And during the time it was being played, were the controls being manipulated?

A. No, they were not.

Q. They were not being turned?

A. No, sir.

[fol. 604] Q. There was no change in the volume throughout the entire play time, is that your testimony?

A. I don't recall. I don't believe so.

Q. You don't remember. Pardon.

A. I don't believe so.

Q. You don't remember; isn't that what you really mean?

A. That's right.

Q. You won't say that there was not, will you?

A. No, I would not for a certainty.

Q. All right. Now, you know that—let me withdraw that. Prior to that date, when did you last hear it in the District Attorney's office, prior to last Thursday?

A. Possibly sometime in December of '62, if I recall correctly.

Q. Well, what about the three or four times you heard it last week or the week before?

A. Last week we played it two or three times.

Q. Yes. That is what I am talking about. Prior to Thursday, when was the last time you heard it?

A. We played it two or three times on Thursday.

Q. On Thursday?

A. Yes.

Q. That was the only day on which you played it?

A. If I recall correctly.

Q. You know who operated the machine that day on those two or three occasions? When I say "the machine," I mean the tape recorder on the playback; you know, don't you?



A. Yes.

Q. Who did?

A. I think Detective Feely and myself.

Q. Now, when you were operating it, did you have to make a change on the controls of the volume?

A. I don't recall if I did.

Q. You don't remember that. Did you find, on listening to the tape, that you say you recorded on June 28, that there were inaudible places on the tape?

A. Several words were difficult to understand.

[fol. 605] Q. Well, isn't it true that, in addition to the several words that were difficult to understand, there were gaps and blanks where you could hear nothing?

A. That's correct.

Q. And you had no information as to what was said during the course of those gaps or blanks or spaces where you heard nothing, isn't that true?

A. That is correct.

Q. Now, prior to the day on which you played the tape, last Thursday, three or four times, when was the last time that you heard it played?

A. I'm not positive about the date, but it would go back to 1962, the latter part of the year.

Q. And at that time isn't it true that there were drifts or fadeouts or blanks in the tape as you heard it played back?

A. There were inaudible parts on the reel.

Q. And you have no knowledge or information as to what was being said in the course of the conversation transmitted by a concealed bug in the office of Harry Steinman and being recorded on that tape, have you?

A. Of the inaudible portions?

Q. Yes. You don't know anything at all about what was said?

A. There were a few words that were inaudible. I wouldn't know what they were talking about then, no.

Q. Are you saying now that there were only a few inaudible words? Is that your testimony, Detective Reilly?

A. I would say a few inaudible words, yes.

Q. Can you tell us, Detective Reilly, what were the causes for these blanks or fadeouts or gaps in the recording of the tape?

A. At times the person's speaking voice would either raise or lower or go away from the instrument, apparently; [fol. 606] movements in the room, where they would walk away from the instrument; the voices would be difficult to hear at times, you would have to raise the volume.

Q. At the time of the recording, you raised the volume?

A. That is correct.

Q. And even so, there were still gaps and drifts?

A. People would leave the room.

Q. Now, you are just guessing about that, aren't you? Isn't that true? You are just guessing?

A. Certain event at the time they were leaving the room.

Q. And that would be a guess?

A. Yes.

Q. For all you know, they could have gone to a distant part of the room, the furthest away from the concealed bug and engaged in a conversation which to the ear couldn't be picked up, isn't that so?

• • • • •  
A. I would say yes.

• • • • •  
Q. Now, in addition to the blanks or the spots that you couldn't hear, isn't it true that you heard interferences in places where you could hear something being said without being able to pick out the words?

A. No, I wouldn't say we heard interferences.

Q. You did not hear any interferences?

A. I don't believe so.

Q. And you heard this tape only last Thursday, and you are satisfied there were no interferences?

A. That is correct.

Q. No static?

A. No static.

Q. No external noises other than voices, is that right?

A. That is substantially correct.

Q. Well, now, can't you tell us one way or the other, whether you heard any outside noises other than the voices?

• • • • •

[fol. 607] A. There were occasions when we would get a hum from the machine itself.

Q. Besides the hum from the machine itself, did you get any other noises?

A. I don't recall.

Q. You don't remember. Did you remember hearing any other noises when you listened last Thursday the three or four times that you listened?

A. Other than the hum of the machine, I don't believe so.

Q. That's all? Now, was the whole conversation on June 28 taken on one roll of tape?

A. I believe it was.

Q. There were no changes?

A. I don't believe so.

Q. Of the reel or the roll?

A. I don't believe it was changed. I believe it was all on the one tape.

• • • • •

Q. Did you ever change any of the reels on the 28th?

A. No, I did not.

Q. Did you see any of the others change reels?

A. I don't recall. I don't believe so.

Q. You did have to say, you would have to say you don't know, isn't that true?

A. I don't recall, I don't know.

• • • • •

Q. And are you aware that on the playback of a tape on a recorder there is a chance for an erasure of the tape?

A. No.

Q. You are not aware of that possibility, sir?

A. No.

Q. Do you know how many buttons there are on the machine that you played back on?

A. I don't recall.

Q. Well, do you know whether or not anybody ever by mistake pushed the wrong button and erased instead of played back?

A. To my knowledge, no.

Q. You don't know, isn't that true?

A. Not to my knowledge.

Q. Isn't that the answer?

A. That is the answer.

[fol. 608] Q. All right. You recognize, Detective Reilly, that tape is the most flexible medium for modification, isn't it?

• • • • •  
The Witness: Yes, it can be modified.

By Mr. Brill:

Q. Intentionally, or by error; isn't that true?

A. That is correct.

• • • • •  
Redirect examination.

By Mr. McKenna:

• • • • •  
Q. Did anything in your presence accidentally erase that tape?

A. No.

• • • • •

Q. As a matter of fact, to erase a tape, is it not true that you have to turn off the sound, that you cannot actually hear the tape if you are erasing it?

A. That is correct.

Q. Is it possible to erase the tape while you are replaying it?

A. No, it is not.

Recross examination.

By Mr. Brill:

Q. Yes, when you put it on and you press the button for replay, before sound comes on, and are heard in the playback, it is possible to erase the tape, or a portion of it, isn't it?

A. Not unless you press the wrong button.

Q. Right. And you cannot say that that was not done ever, can you, with respect to this tape?

A. Not in regards to the conversation that I recorded.

[fol. 609] Q. You cannot say honestly that that was not done with respect to this tape, can you?

A. On portions other than what I recorded?

Q. On any portions?

A. Yes, I can.

Q. Can you recall, you can say honestly now that there was no erasure made accidentally, or otherwise, on this tape?

The Court: On the part that you recorded.

Q. On any part?

A. No, not on the part that I recorded.

Q. On any part? You recorded the whole thing? Didn't you?

A. On the 28th?

Q. Yes, that is what I am talking about. All of this deals with the 28th, doesn't it?

A. That's right.

Q. And can you now say that there wasn't an erasure by accident, or otherwise, on any part of that tape?

A. Yes, I would say I can say that.

Q. You would say that?

A. Yes.

• • • • •

DETECTIVE SIDNEY BERKOWITZ, Shield 1391, District Attorney's Office Squad, New York County, Police Department, City of New York, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKenna:

• • • • •

Q. And now, Detective Berkowitz, I direct your attention to June the 29th, 1962; did you receive an assignment from your superior officer on that day?

A. Yes, I did.

• • • • •

[fol. 610] Mr. Brill: Just a moment, please. Your Honor, at this time may I interpose what we now characterize in this case as the "general objection"?

The Court: You may, sir, and the Court adheres to its initial determination.

Mr. Brill: Very good, sir.

The Court: And allows you an appropriate exception.

Q. Now, what did you do on June the 29th, 1962?

A. I was assigned to monitor an eavesdropping device in 15 East 48th Street, Room 801, on that date.



Q. Now, on that date did you hear conversations emanating from Room 801 at 15 East 48th Street?

A. Yes, I did.

Q. And approximately how many voices, and approximately when was it that you heard the conversation emanating from Room 801 in 15 East 48th Street?

A. Well, I heard conversations throughout that day.

Q. When was the first conversation you heard?

Q. How many voices participated in that conversation?

A. Three voices.

Q. Had you heard any of these voices previous to June the 28th?

A. I had heard all these voices previous to that.

The Witness: I had heard these voices, the three voices before, on that eavesdropping, but only—on that eavesdropping device, but only one of those voices had I heard in person.

The Court: Did you hear any of them prior, in person, prior to June 29th?

The Witness: No, sir.

[fol. 611] Mr. Brill: Now, I object to the balance of the testimony which this witness hopes to give.

The Court: Your objection is overruled.

By Mr. McKenna:

Q. Did you hear these voices subsequent to June 29th?

A. Just one.

Q. Just one?

A. One of them.

Q. Which one?

A. The voice of Harry Steinman.

Q. And when was it that you heard the voice of Harry Steinman?

Mr. Brill: I object to it.

The Court: Overruled.

The Witness: I heard him twice on July 17th, 1962, and once on August 28th, 1962.

Q. Where was it?

Mr. Brill: I object to that, if your Honor please.

Q. Where was it that you heard this?

The Court: On what grounds?

Mr. Brill: On the grounds that it does not qualify him now to testify with respect to conversations he said he heard on 6-29.

The Court: I ruled to the contrary.

Mr. Brill: He recognized one voice, your Honor.

The Court: I ruled to the contrary. You have an exception.

Mr. Brill: Thank you, sir.

By Mr. McKenna:

Q. Where was it that you heard the voice of Harry Steinman on the subsequent occasions?

A. On July 17th I heard him in the evening in Jack Silverstein's Bar.

[fol. 612] Q. Where was that?

A. That was on Broadway and 51st Street, and I heard him later that evening in the Stage Delicatessen on Seventh Avenue and 53rd Street. On August the 28th—

• • • • •  
The Witness: On August the 28th, 1962, I heard him again in the Tenement Bar. That is on, I believe, 1046 Second Avenue.

Q. Did you actually hear him say anything?

A. Yes, I heard him in conversation.

Q. Now, subsequent to June the 29th, 1962, did you have occasion to identify the other two voices in the conversation of June the 29th, 1962; just answer yes or no?

• • • • •

The Witness: Yes.

Q. Do you recall when it was, just the date now, when the other two voices in that conversation were identified to you?

Mr. Brill: No, I object to this, if your Honor please, this is pure hearsay.

The Court: I will allow it.

Mr. Brill: Somebody identified it to him, he can't say that he recognized the voices.

The Court: I will allow it, overruled.

You may answer, sir.

The Witness: Well, I knew the other two voices.

Q. Just tell me when the other two voices were identified to you on a subsequent occasion?

A. Well, once when I appeared at the Grand Jury.

The Court: Just give us the date, nothing else.

The Witness: I don't recall the exact date.

[fol. 613] Q. Did you hear one of those voices in person on that date?

Mr. Brill: I object to it, if your Honor please. This is subsequent to the event.

The Court: You may answer it, sir.

• • • • •

Mr. Brill: Subsequent to the charges contained in the indictment.

The Court: You may answer it, sir.

Mr. Brill: Can we fix the date when he appeared before the Grand Jury, your Honor?

The Court: I asked him for that date.

Mr. Brill: Yes.

The Witness: Well, Frank Jacklone, himself, has identified—

The Court: Wait.

Mr. Brill: I object to this, if your Honor pleases.

The Court: Do you know the date, sir?

The Witness: I can give the date when Frank Jacklone identified his voice to me.

Q. What date?

Mr. Brill: I object to this now, if your Honor please.

The Court: I will allow it, overruled.

You may answer.

The Witness: I believe it was October the 15th and 17th.

By Mr. McKenna:

Q. Of this year, or last?

A. October 17th of this year.

[fol. 614] Mr. Brill: 1964?

The Witness: Yes, October the 17th, 1964.

Mr. Brill: Your Honor, I object to any further examination with respect to what he claims he heard on June the 29th, in view of this answer. It could not be admissible under any circumstances.

The Court: So far as the voice of Frank Jacklone is concerned—

Mr. Brill: As far as the other two voices are concerned.

The Court: I will reserve decision.

•   •   •   •   •   •   •  
New York, October 27th, 1964  
11:20 o'clock a. m.  
•   •   •   •   •   •   •

(The following proceedings were had in the absence of the jury:)

Mr. McKenna: Your Honor, through the witness Berkowitz the People wish to prove that he overheard in person a conversation emanating from Room 801 at 15 East 48th Street, on January the 29th, 1962, at about ten-fifty a. m.; not only overheard this conversation in person, but he recorded it.

Subsequent to that time he heard in 1962 the voice of Harry Steinman, which he identifies as one of the participants in the conversation. In 1964, in preparation for this trial he overheard the voice of Frank Jacklone which he identifies as another participant in that conversation. [fol. 615] Finally, the third voice was identified to him by brother officers from the tape recording which he simultaneously made at the time he was overhearing the conversation. He remembers the substance of the conversation vividly. He has a specific, independent recollection of the substance of the conversation.

By playing the tape of that same conversation for brother officers they identified to him the voice of Ralph Berger, so that he is now able to say what he overheard, personally, in that room, and can identify those three voices.

Therefore, on that basis I believe that that evidence should be received.

Mr. Brill: I would object to it, if your Honor please, on the ground, first, in respect to the offer of proof concerning his recognition of the voice of Jacklone, the time is far too remote, approximately two years and a half having elapsed, since his hearing, since it is alleged that he heard by the eavesdrop device that which he says he heard on June the 29th, and, moreover, under no circumstances could it possibly be admitted in evidence, the testimony of this witness with respect to anything alleged to have been said by the defendant Berger, in view of the fact that concededly the witness never heard his voice and it was a matter of hearsay, as he attempted to say when he was in the Grand Jury.

Now, somebody identified it to him. I press the objection.

Mr. McKenna: One other point, Judge, the People can prove a voice identification by circumstantial evidence. Now, Jacklone already testified that his recollection as to the substance of that conversation was—well, he testified [fol. 616] to his recollection of the substance of that conversation, and Berkowitz's testimony, of course, with the

testimony of Jacklone, we say that, therefore, we have circumstantially proved the identification of the voices.

The Court: I would normally admit what the detective overheard on the morning of June the 29th, 1962, if there was satisfactory evidence of voice identification, but that evidence is palpably lacking by the very statement of the District Attorney that, at least with respect to one of the participants to the conversation, Frank Jacklone, he heard his voice for the first time some two years and four months after the event.

I hold as a matter of law that the factor of remoteness precludes the receipt of this evidence and the Court summarily rejects it.

Mr. McKenna: Could I make one more offer of proof, your Honor?

The Court: You may.

Mr. McKenna: So I will alert the Court to what I intend to do.

The Court: All right.

Mr. McKenna: I intend to ask Detective Berkowitz if he prepared a transcript of the conversation that was recorded on that morning.

I also intend to ask him on what basis he had identified the voices in that tape recording. He will testify he has personal knowledge of the voice of Harry Steinman, he has personal knowledge of the voice of Frank Jacklone, and the voice of Ralph Berger was identified to him for the purposes of this transcript by Detective Cronin and Bernhard. I intend to call the other detectives to connect—

The Court: If it is connected—

[fol. 617] Mr. McKenna: Yes?

The Court: —with other testimony, I will accept it, only for the purpose of establishing the accuracy of the transcript.

Mr. McKenna: That is all I want.

The Court: For that limited purpose.

Mr. Brill: He said "connect," Judge. How does he mean that, connect what? What is he going to connect?



Mr. McKenna: The tape recording.

Mr. Brill: How can he connect it? Is he going to have Cronin and another detective testify that they identified the voice of Berger to Detective Berkowitz? That is not a connection.

Mr. McKenna: Also, they will listen to the tape recording. They have compared the transcript prepared by Berkowitz with the tape recording and where the transcript reflects recounting the voice of Berger, that as far as they are concerned it is the voice of Berger.

Mr. Brill: In the first place, you have got a long way to go to the transcript—

Mr. McKenna: I am just going to mark them for identification.

Mr. Brill: Well, acknowledgeably and concededly, in the course of the several sessions which we have had with the Court, in the absence of the jury, this is not a complete transcript. It contains errors, it was submitted to the Court and counsel subject to corrections which they said that there was no question about, that they would have to make, and how in these circumstances can the Court be expected to receive evidence of this character based on the remoteness, first, the factor of remoteness with respect to the witness Jacklone; and, secondly, again based upon [fol. 618] hearsay—under no circumstances, in no way can it be received.

The Court: All right, I have already precluded the District Attorney's offer of evidence with respect to what Detective Berkowitz allegedly heard. I have already stated that he may not give testimony in that respect because of the fact that he cannot identify, at least one of the voices, and that is enough to bar such testimony, at least in my opinion.

What he is now offering is of an entirely different nature and you may proceed with your offer.

Mr. Brill: Except, Your Honor—

The Court: Now, with respect to the paper, itself, if you have any objection to its introduction please reserve it until the District Attorney makes the offer.

(Whereupon, the jurors were called and each juror answered present.)

SIDNEY BERKOWITZ, resumed the stand and testified further as follows:

Direct examination (Continued).

By Mr. McKenna:

Q. Detective Berkowitz, isn't it true that yesterday you testified that you made a recording of a conversation you heard emanating from Room 801 at 15 East 48th Street on the morning of June the 29th, 1962?

A. Yes, sir.

Q. And is it also true that yesterday you testified that subsequent to that date you had a—you overheard in per-[fol. 619] son one of the voices that was participating in that conversation; is that correct?

Mr. Brill: That is objected to.

The Court: I will allow it.

Q. Is that correct?

A. Subsequent to that date I heard two voices in person.

Q. Now, you testified yesterday you heard the voice of Harry Steinman, is that correct?

A. Yes, sir.

Q. What date was that?

A. July 17th, 1962, I heard his voice.

Q. Did you hear it again after that?

A. Yes, I did, on August the 28th, 1962.

Q. Now, did you hear it in person; did you hear it in person, did you hear in person one of the other voices that participated in that conversation?

A. Yes, I did.

Q. Whose voice?

A. Frank Jacklone.

Q. When was it that you heard the voice of Frank Jacklone, in person?

A. I heard it October the 15th, and 20th, of this year—October 15th, 17th and 20th of this year.

Mr. Brill: Now, if your Honor please, in view of that answer I move to strike the testimony with respect to his alleged recognition of the voice of the witness Jacklone, by reason of the factor or remoteness. It was approximately two years and four months that had elapsed since the date of the alleged transaction concerning which he testified.

[fol. 620] The Court: For the record. Well, I have already indicated that I will not permit testimony from the witness as to what he purportedly overheard, so I see no reason for your motion.

Q. You made a recording, did you not, of the conversation on June the 29th, 1962?

A. Yes, I did.

Q. Now, that tape recording is contained on Reel 5483, is that correct?

A. That is correct.

Q. Now, did you do anything after June 29th, 1962, in relation to the tape recording on Reel 5483?

A. Well, I transcribed it.

Q. When you say you transcribed it, what did you actually do?

A. Well, that particular original recording was originally transcribed by another detective at the plant.

Q. Never mind—

Mr. Brill: Oh, yes, I think this is indicative of the fact he is not competent to testify with respect to it.

The Court: The question is, what did you do, not what anyone else did; what did you do, if anything, with respect to that particular recording, Reel 5483? And we are referring now to the recording purportedly made on June 29th, 1962, at about 10:15 a. m.

The Witness: Recently I made a new transcription of that recording.

Mr. Brill: Now, I object to that.

The Court: I will allow it, overruled.

Mr. McKenna: I ask that this be marked for identification.

(A transcript was marked People's Exhibit 62 for identification.)

[fol. 621] (Whereupon, the following proceedings were had at the Bench, out of hearing of the jurors and the witness:)

Mr. Brill: May we have a statement from the District Attorney, either by way of acknowledgment, or concession, that Exhibit 62 for identification, purporting to be a transcript of Reel Number 5483 of June 29th, 1962, at 10:50 a. m., is another copy of the document heretofore furnished to the Court and counsel, and which are now identified by the Court and counsel as a transcript of the second reel, Reel Number 2, the conversation?

Mr. McKenna: It is all one reel, Mr. Brill, two conversations on the same reel.

Mr. Brill: It is transcript Number 2.

Mr. McKenna: Right.

Mr. Brill: Furnished during the course of the two hearings on the dry run before the Court.

The Court: You will so concede?

Mr. McKenna: Yes.

One other thing, at the time we furnished Mr. Brill with the transcript Number 23 we reserved the right to make a

final copy saying that there could be errors and it was not complete. Now, People's Exhibit 62 for identification, we represent is the final and complete transcript of that.

Mr. Brill: Then it is not the same as was furnished to us before?

Mr. McKenna: There is some additional matter, in substance it is the same.

(Whereupon, proceedings were resumed in open court, as follows:)

[fol. 622] By Mr. McKenna:

Q. Now, Detective Berkowitz, you testified that you had a personal conversation, or you overheard a personal conversation of the two—of two of the voices, Harry Steinman and Frank Jacklone?

A. Yes.

Q. Have you had occasion to identify the third voice participating in that conversation; just answer yes or no?

Mr. Brill: Your Honor has ruled on this matter.

The Court: You may answer yes or no.

Mr. Brill: Your Honor has ruled on this matter.

The Court: Do you understand the question?

The Witness: He wants to know if there was personal identification.

Q. Any identification, any form of identification; just answer yes or no?

A. Yes.

Q. When was this third voice identified to you?

A. The voice of Ralph Berger was identified to me on June 29th.

Q. What year?

A. 1962.

Q. By whom?

A. By Detectives Anthony Bernhard, and by Detective Reilly.

Mr. Brill: Now, I move to strike it out, Your Honor. Obviously, this is pure hearsay of the rankest type.

Mr. McKenna: It is only being offered for the accuracy of the transcript.

The Court: I will allow it. Overruled.

Mr. Brill: It cannot be offered for the accuracy of the transcript, your Honor, because it does not go to the accuracy of the transcript.

[fol. 623] Mr. McKenna: I intend to call these witnesses.

The Court: I will allow it, subject to connection.

By Mr. McKenna:

Q. Did any other detective identify to you the third voice in that conversation?

Mr. Brill: Objected to.

The Court: I will allow it.

Q. Just yes or no?

A. Yes, sir.

Q. Who?

Mr. Brill: Objected to.

The Court: Overruled.

The Witness: Detective Cronin.

Q. When?

Mr. Brill: Objected to.

The Court: Overruled.

The Witness: On January 9th, 1963.

Q. As a result of this identification, is it true that you prepared a transcript of the tape recording, of the conversation that is recorded on Tape 5483?

Mr. Brill: That is objected to.

The Court: Overruled.



A. Yes.

Q. Can you testify that the transcript that you prepared on the basis of the personal identifications, as well as the other identifications that were given to you, is a true and accurate transcript of the conversation that is recorded on Reel 5483?

A. Yes, sir.

Q. I show you People's Exhibit 62 for identification and ask you what that is?

A. That's a transcription of the conversation that I [fol. 624] heard at approximately 10:50 a. m., on June 29, 1962.

Q. And is that the conversation that's recorded on Reel 5483?

A. Yes, sir.

• • • • •  
Cross examination.

By Mr. Brill:

Q. When did you make the paper that you hold in your hand, Exhibit 62 for identification, Detective Berkowitz?

• • • • •  
A. I made this copy last week.

Q. Can you tell us the date on which you made it?

A. I worked on it for a couple of days, I believe. I couldn't give you the exact.

Q. Well, how many days?

A. I think two days.

Q. Could it have been more than two days?

A. No, not on this particular—

Q. Not on this particular—

A. Not on this one, no, sir.

Q. At the time that you made that, what did you have to help you?

A. I had a tape recording, Ampex.

Q. And what else?

A. I had another detective who was assisting me.

Q. What other papers did you have?

A. I had some scratch paper.

Q. Scratch paper? What did you do with the scratch paper?

A. I discarded it.

Q. Was it scratch paper that you made?

A. Yes, sir.

Q. When did you make the scratch paper?

A. At the time I—this was last week.

Q. Last week. And when did you discard the scratch paper?

A. Excuse me. I have the—I have the scratch paper. I can get it.

[fol. 625] The Court (to the witness): When you say "scratch paper," are you referring to notes that you might have made?

The Witness: Notes, yes.

The Court: While you were listening to the recording?

The Witness: Yes.

The Court: You say you have these notes?

The Witness: And from those notes I was able to—

The Court: Prepare the transcript.

The Witness: —prepare the mats for this.

Mr. Brill: Prepare the what?

The Witness: Prepare the mats, m-a-t-s.

By Mr. Brill:

Q. You mean mimeograph mats?

A. Yes, sir.

Q. All right. Now, how many times did you play the tape before you were finally able to prepare the mats for Exhibit 62 for identification?

A. That's a difficult question for me to answer.

The Court: Give us your best answer to that question.

The Witness: Well, if I can qualify it, sir, I don't play it right through. Sometimes I play it right through. What I usually do, I play part of it and as long as it's very audible I listen and take notes. Then it comes to a part that's more difficult. Then I'll stop it and maybe play one particular part over ten or twelve times.

Q. Or more times than that?

The Court: Ten or twelve times.

A. Some parts of it I may play only two or three times. Other parts I can play a dozen times. So I can't say how many times I played it right through.

[fol. 626] Q. Have you any idea as to the number of times you played it through?

The Witness: Where actually played it through from beginning to end?

Mr. Brill: Yes.

A. Maybe four or five times, the most.

Q. Now, how long did it take you, actually, in time consumed to get to the point where you could make the mats for Exhibit 62 for identification?

A. I'd say about eight or ten hours.

Q. In one day?

A. No. Over a period of several days.

Q. Several days. Now, I think you told us it took two or more days?

A. Two, but—two days.

Q. Was anybody with you at the time that you did this?

A. Detective Feeley.

Q. Feeley?

A. Detective Feeley was with me on one of these days.

Q. And on the other day was anybody with you?

A. No, there was one day I worked myself.

Q. Did Detective Feeley, on the day that he was with you, make scratch notes, too?

A. No, I made all the notes.

The Court: Then I make the direction of the witness to produce those notes.

By Mr. Brill:

Q. You told us earlier you discarded the notes, didn't you? Are these the same notes that you say—that you said earlier you discarded?

A. No, sir.

Q. Are these other notes than those which you discarded?

The Witness (to the Court): If I might explain—  
[fol. 627] The Court: You may, sir.

The Witness: I take down what I hear. However, I always have an extra piece of scratch paper. Sometimes, when I come across a difficult sentence, maybe a sentence with eight words in it, that I can only hear maybe six very audibly, I'll write down the six, leaving the space for the two, and then listen more intently and, finally, if I can catch one or two of the other words, I will put it in. If I can't, I'll just put it down "inaudible." Then I'll write it down on the notes which I still retain. That piece of scratch paper, where I just made these superficial notes I—I discarded.

Q. Did you find, when you finished Exhibit 62 for identification, that you had missed quite a lot of things?

A. No.

Q. You didn't?

A. No, sir.

Q. Well, on the first page, for example, didn't you miss at least ten different things? Just count them to yourself.

A. No, sir. I don't count ten.

Q. You don't count ten?

A. No, sir.

Q. How many do you count that you missed?

A. I count three.

Q. Three? Would you be good enough to mark them on this copy, please, with this pencil or with a pen, rather, because I've made some penciled notations (handing document to witness)?

The Witness: Shall I number them?

Mr. Brill: Yes. If you like.

(Witness marks document as requested.)

Q. What about immediately below that?

A. Where I put down a series of dots, that is my way of denoting there's a pause.

[fol. 628] Q. Or something that you didn't hear. Isn't that right?

A. No, sir. If I hear words that I don't—something that isn't audible, I write down "inaudible."

Mr. Brill: I see.

Q. Now, on each of these three things that you wrote down or that you marked, rather, you marked "inaudible." Right?

A. Yes, sir.

Q. But where there's a pause, you didn't make a notation. Right?

A. Well, where there's an extremely lengthy pause—

Q. Any pause. Let's not get into lengthy ones or short ones, a pause. You made no notation. You didn't say "inaudible," in other words.

A. My only notation are those series of dots.

Q. Which meant that there was something you didn't hear, isn't that so?

A. Yes, I guess you could say that.

Q. All right. Now, then, look at Exhibit 62 for identification and tell me if there aren't at least ten places where you made dots indicating something you didn't hear (handing document to witness)?

A. Well, there's seven little dots, which would indicate pauses.

Q. Or that you didn't hear something. Isn't that so?

A. Well, where there's a pause there's a silence. Silence, I don't hear nothing in silence.

Q. So now we're up to seven—right—on the first page?

A. Incidentally, one of those things you have marked up was two dashes. That is my way—when I make a dash, that's my way of denoting an interruption. It could be an interruption in conversation or by another person or an interruption in their own conversation, an interruption of thought.

Q. Or something you didn't hear?

A. No, sir. Where someone speaks, and right in the middle of his speech he breaks off into a different trend of thought, I usually denote it by making a dash. That's my way.

[fol. 629] Q. What you're doing is telling this Court and jury that you wrote on this what were your impressions as to whether the man broke off into another thought or something else. Isn't that so?

A. Yes, sir.

Q. Your impressions. But there's at least one here where there are three dashes. Isn't that so?

A. Yes, sir.

• • • • •  
Q. So there are at least seven places on page 1, in which you didn't hear something that may have been said, in addition to those seven places on page 1, in which you didn't hear something that may have been said, in addition to those places where you interposed your impressions.

• • • • •  
A. As I stated, those seven points, where I left, put in those series of dots, with points of silence, short periods of silence in a conversation.

Q. Did you measure the periods of silence?

A. Some of them I did. The periods—



Q. Did you measure any on page 1, for example (handing to witness) of 62 for identification? Look at it, please. Did you measure any of the periods of silence?

A. I measured them in that—that I felt they were all less than ten seconds. Those that were more than ten seconds, I would put down the period.

Q. Did you clock them?

The Witness: On page 1?

Mr. Brill: Yeah. Did you clock them?

A. On page 1 I did not clock them.

Q. You didn't clock them. So here again we have your impression of what you heard or didn't hear. Isn't that so?

A. Yes, sir.

[fol. 630] Q. And where there is silence, you mean that you didn't hear anything, although something may have been on the tape. Isn't that so?

. . . . .

A. I don't feel something was on the tape. If I—

. . . . .

A. Wherever I heard anything, although I didn't get the import of what was said, I put down "inaudible." Where I heard nothing, I would put these dots.

Q. All right. So it's true that there were places on the tape, at least in so far as the first page is concerned, where you heard nothing. Right?

A. Yes, sir.

The Court: May I inject just one question at this point? I notice on this first page that you have dashes and dots.

The Witness: Yes, sir.

The Court: Now, you've already stated that where words were heard by you but you couldn't make them out, you made the connotation on the exhibit "inaudible." Is that correct, sir?

The Witness: Yes, sir.

The Court: And I believe you've also testified that where you heard nothing, you made some dots.

The Witness: Yes, sir.

The Court: Now, some places you made four dots, and other places you made three dots, in other places you made five, in one I see nine dots. Do the number of dots have any particular significance, the number of dots?

The Witness: No, sir, just that there was a pause, felt there was a pause at that point.

[fol. 631] The Court: Now, I notice in at least one place on the first page there are two dashes, and now I see a place where there are three dashes. Is there any significance to the dashes, in relation to the dots, or do they mean the same?

The Witness: No, sir. The dash would be an interruption in speaking.

The Court: And that is the distinction that you have drawn, when you put dashes in the transcript.

The Witness: Yes, sir. Might I add, when I made the dots, sometimes I didn't make this exact number, but the stenographer, in preparing the mat, I would put—

Mr. Brill: I object to this, if your Honor pleases; what somebody else did.

The Court (to the witness): You may state what you placed on the mat for the stenographer. This all goes to the accuracy of the transcript. I will accept it.

Mr. Brill: What he did.

The Court (to the witness): What you did.

The Witness: Well, I didn't actually type out the mats. A stenographer typed out the mats and I fed her the information to type out, and wherever she saw the dots, maybe I could have three or four dots on my original, she might put four where I had three, or vice versa. I didn't bother making any correction on that because—

The Court: In any event, you have already said that the number of dots have no real significance other than to indicate a pause?

The Witness: Yes, sir.

The Court: A pause?

The Witness: Yes, sir.

The Court: And you have already stated that the dashes signified an interruption in the conversation?

[fol. 632] The Witness: Yes, sir.

The Court: And where you have the connotation "inaudible," there were words on the tape that you could not discern?

The Witness: That's correct.

By Mr. Brill:

Q. And where you say "pause," you actually mean that you didn't hear something at that time. Isn't that so?

A. That's where I felt that there was nothing—

• • • • •

Mr. Brill: I want to get this clear, your Honor, because there is a vast distinction in my mind between a pause and a silence, as he uses it.

By Mr. Brill:

Q. When you say "a pause," Detective Berkowitz, you mean that you didn't hear something. Isn't that so?

A. Yes. Pause is silence.

Q. Right. So wherever you have dots, there is something that you didn't hear. Are we agreed on that?

A. Yes, sir.

Q. All right. Now at the time when you played the tape last week and spent the eight or ten hours doing it, did you make stenographic notes of what you thought you heard?

A. Not stenographic notes.

Q. Handwritten notes.

A. Handwritten notes, yes, sir.

Q. All right. Now at the time that you made these notes, you put down what you thought you heard. Isn't that right?

A. I put down what I knew I heard.

Q. Your impression of what you heard.

A. Yes, sir.

Q. Now while you were playing the tape back, did you have to exercise—did you manipulate the controls?

A. Yes, sir.

Q. Did you have to raise the volume from time to time?

A. Yes, sir.

[fol. 633] Q. Did you have to lower it from time to time?

A. Yes, sir.

Q. There was not a steady flow, was there?

A. Sometimes, when I played it right through, there was.

Q. Sometimes. Did you get interferences as you were playing the tape?

A. Only where there was—only where there was some interference already on the tape.

Q. Yes. There were interferences on the tape, weren't there?

A. Yes, sir.

Q. There were static noises, is that right?

A. Occasionally.

Q. And other noises as well which were not conversation?

A. Yes, sir.

Q. Street noises?

A. I don't recall any street noises, sir.

Q. Outside noises?

A. By "outside," exactly what do you mean?

Q. Any noises outside of conversation.

A. Yes, sir.

Q. That is what I mean. Lots of them, weren't there?

A. Well, it is relative. I don't know what you mean by "lots of them." I felt that there weren't that many noises that stopped me from getting the full import of the conversation.

Q. From what you say was your impression of the full import of the conversation, isn't that right?

A. Yes, sir.

Q. All right. So that what you felt was the full import is not necessarily an accurate transcript of what was said on the tape, isn't that so? Yes or no, please.

A. I feel it is an accurate transcript.

Q. Well, aren't you trying to defend what you did in respect of your listening and making notes and transcribing them?

The Witness: Yes, sir. And I feel as to the judgment of accuracy somebody else— Do I feel that this is accurate?

[fol. 634] The Court: Pardon me. The question, basically, is whether or not your assertion that People's Exhibit 26 is an accurate transcript is motivated by your desire to protect your own conduct in this case.

The Witness: No, sir. No, I—my answer isn't to protect my own conduct. I feel that this is a true and reliable transcription of—

The Witness: —of what was said.

Q. Notwithstanding your acknowledgment that there are at least seven silences on your transcript on the first page, which you were not able to get from the tape?

Mr. McKenna: That is not the testimony.

The Court: Is there an objection?

Mr. McKenna: I object.

The Court: Sustained.

Q. Are you saying now, Detective Berkowitz, that this is an accurate transcript of what is on the tape, in spite of the silences which you indicated on page 1?

Mr. McKenna: Objection.

The Court: And I sustain the objection.

You need not answer.

Mr. Brill: I don't understand that, Judge.

The Court: I understand my own ruling, sir, very well.

Mr. Brill: Well, could I approach the bench and get some clarification?

The Court: I see no necessity for arguing a question of this character.

Mr. Brill: I don't want to argue it. I just want to be able to frame the question properly.

Q. In the operation of a machine, you are obliged from time to time to stop, to wind your reel, and to replay, isn't that right?

A. Yes, sir.

[fol. 635] Q. How many times have you done this, this kind of thing, on a tape recorder?

The Witness: Innumerable times. I couldn't give you a number.

Q. Now, can you say that in all of the times that you did this, that you never by accident or for any other reason erased a part of a tape?

A. Well, what do you mean by "accident or any other reason"? that part, if you qualify that.

Q. Well, suppose I help you out by withdrawing those three words—

A. Fine.

Q. —or four words. Can you say you never erased any part of a tape?

A. I don't recall ever erasing anything.

Q. You would say that you had been perfect in all of these times?



A. I don't know what you mean by "perfect." I know I am far from perfect.

Q. Now, at the time that you were making your notes, frankly, Detective Berkowitz, you weren't able to write out word for word what now appears on Exhibit 62 for identification, were you?

A. No. There was no need to.

Q. No need to do what? I don't understand it.

A. To make this transcript word for word as I have it here. I had a prior transcript.

[fol. 636] Q. I beg your pardon. You had what?

A. A prior transcription.

Q. Which you had before you at the time that you were making this one, Exhibit 62 for identification?

A. Yes, sir.

Q. Now, do you recall earlier on my cross-examination that I asked you if you had anything else at the time that you were making this and you said, "No"? Do you remember that?

The Witness: Yes, sir.

Q. You didn't tell us you had another transcript of Exhibit 62 for identification, did you?

A. No.

Q. Now, was it identical with Exhibit 62 for identification?

A. No, sir.

Q. Had you prepared it, the other document, the transcript?

A. No, sir.

Q. It was somebody else's work?

A. Yes, sir.

Q. And you were relying upon somebody's else's impressions, together with your notes, to make Exhibit 62 for identification; is that what you are telling us? Yes or no.

A. No, I am not telling you that. I was relying on what somebody else had made plus what I had heard.

Q. So that it is not true, then, or I will withdraw that. So it is fair to say, then, that Exhibit 62 for identification is based upon someone else's impressions as well as your own, isn't that so?

A. No, sir.

Q. It is not?

A. No, sir.

Q. All right. But you nevertheless had somebody else's transcript before you at the time that you made up 62 for identification?

A. Yes, sir.

Q. Now, you have a copy of that here?

[fol. 637] Mr. McKenna: Mr. Brill, I have his notes. They are incorporated in the other transcript.

Mr. Brill: And is this the transcript?

Mr. McKenna: Yes, sir, and the notes.

• • • • •  
(The document referred to was marked Defendant's Exhibit S for identification.)

• • • • •  
Q. Now, I show you Exhibit S for identification and ask you to tell us, Detective Berkowitz, whether this is the transcript that you referred to.

• • • • •  
A. Yes, sir.

• • • • •  
Q. Now, was it in the condition which it appears now?

A. No, sir.

Q. Did you make the marks or changes on it?

A. Yes, sir.

Q. In your own handwriting?

A. Yes, sir.

Q. At the time that you were making the notes?

A. Yes, sir.

The Court: Maybe I can clarify it.

Do you know the circumstances under which Exhibit S was prepared?

The Witness: Oh, this was—yes.

The Court: Who prepared it?

The Witness: This was prepared by another detective.

The Court: And who was that detective?

The Witness: Detective Reilly.

Q. Do you know whether Detective Reilly had to listen to the tape a number of times before he arrived at what is [fol. 638] now Exhibit S for identification?

A. I know he listened to it a number of times. I don't know how many.

Q. You don't know how many times?

A. No, sir.

Q. You don't know whether he listened eight or ten hours, like you did?

A. No, sir.

Q. Now, how many pages are there in Exhibit S?

A. Four.

Q. How many pages are there in Exhibit 62 for identification?

A. Seven.

Q. You struck out from Detective Reilly's transcript, Exhibit S for identification, matter which you didn't hear, isn't that true?

A. I struck out a few words that—

Q. You didn't hear the words that Detective Reilly wrote in Exhibit S for identification, did you?

A. There were a few words that I didn't hear that Detective Reilly apparently heard.

. . . . .

Q. Did you hear something other than what Detective Reilly thought he had heard in Exhibit S for identification?

A. On a few, in relation to a few words, yes.

Q. In relation to a few words. Well, let's see. Did you strike out on the first page of Detective Reilly's transcript the language which appears on the third line, the two words there; did you do that?

A. What is the third line?

Q. This is the third line, one, two, three (indicating).

A. I struck it out, but I heard it.

Q. You struck it out, but didn't you write "Inaudible" underneath it?

A. I struck it out and inserted it somewhere else.

[fol. 639] Q. Did you strike it out and did you write the word "Inaudible," which is in parenthesis, immediately under the words stricken out?

A. Yes, sir.

Q. You did that. All right. Now, did you strike out any other words on that page, the first page?

A. Yes, sir.

Q. Will you point with the pencil, please, to the words that you struck out.

A. "We'll meet" (indicating).

Mr. Goldstein: What line are you at?

Mr. Brill: That is the eighth line from the bottom.

Q. Right? You struck out those words?

A. Yes, sir.

Q. And you added words that you believed you heard, right?

A. That is correct.

Q. And they have an entirely different meaning from the words that you struck out, haven't they?

A. Yes.

Q. Now, did you strike out any other words? How about on the sixth line? Did you strike out words there?

A. Yes, sir.

Q. And you wrote words in that had an entirely different meaning from the words that you struck out, isn't that true?

A. Different words, yes.

Q. Different words. And they meant something else, too, didn't they?

A. Yes.

Q. Now, did you strike out anything on the second page of Detective Reilly's transcript, Exhibit S for identification?

A. Yes, sir.

Q. Is that on the 15th line from the top of page 2?

A. Yes, sir.

Q. And did you write in other words which had a different meaning?

A. Other words. It didn't change the meaning any in this particular instance.

Q. Well, didn't you strike out the last four words?

A. The last three words.

[fol. 640] Q. The last three words of Detective Reilly's transcript. And did you write anything else there instead?

A. Yes, sir.

Q. Did you write two words there instead?

A. No, sir, I just—

Q. Show me the words that you wrote in instead of the words that you struck out.

A. I didn't put any words instead of the words I struck.

Q. You didn't substitute for what you struck out any words, right? The last—

A. I substituted a whole sentence.

Q. A whole sentence. Which you interpolated or interposed between the first and the second word of Detective Reilly's transcript, isn't that right?

A. Yes, sir.

Q. And you wrote a whole sentence between those two words, right?

A. No.

Q. You did not?

A. This is the way I make my notes.

Q. I understand that that is the way you make a change.

A. Yes, sir, that is the way I make my changes.

Q. Now, did you make other changes on the 19th line from the top; did you make any changes?

A. Yes, sir.

Q. And did you strike out words there?

A. Yes, sir.

Q. And did you add words?

A. Yes, sir.

Q. And didn't they change the meaning of the word that you struck out?

A. No, sir.

Q. Well, didn't you strike out the words "I know that" on that line?

A. Yes, sir.

Q. Didn't you write in the words "It is all little"—

A. Yes.

Q. And you say that did not change the meaning?

A. No, sir.

Q. All right, did you make any changes on the eighth line from the bottom of that page?

A. Yes, sir.

Q. Did you strike out words and insert words of your own?

A. Yes, sir.

[fol. 641] Q. And did they say the same thing as what you struck out?

A. No, sir, different words.

Q. Now, did you strike out any words on the third page?

A. I struck out one word here.

Q. You mean two words, don't you?



A. No, one word.

Q. Didn't you make two strikeouts on that line, 13th from the bottom?

A. Yes, sir, I made two strikeouts.

Q. All right, and you changed a word from "now" to "so," is that right?

A. That's right.

Q. And that does not mean the same thing, does it?

A. "Now" doesn't mean the same as "so," yes, sir.

Q. Right, and you changed the meaning of that, didn't you? Did you strike out anything?

A. May I answer your question, sir, I did not answer your question.

Q. I beg your pardon, please do, Detective Berkowitz.

A. No, sir, it did not change the meaning at all.

Q. It did not change the meaning?

A. No.

Q. All right, now, did you make any changes on the final line, 6th line from the top of that page?

A. Yes, sir.

Q. Did you strike out words and substitute other words?

A. Just the opposite, it appears I struck out words and I substituted "inaudible." That means I did not substitute any words.

Q. So you did not hear what Detective Reilly heard, right; is that what you meant by that?

A. In that particular case, yes, sir.

Q. Now, how about the ninth line from the bottom, did you strike out anything there?

A. Yes, sir.

Q. Did you substitute something for it?

A. No, sir.

Q. Didn't you add something else beside what you struck out?

A. Yes.

Q. What?

A. I added something, I did not substitute anything.

. . . . .

[fol. 642] Q. Now, on page four did you strike out the third line?

A. Yes, sir.

Q. And didn't you add a whole sentence which changes the meaning of that line that you struck out?

A. Yes, sir.

Q. And at the second line from the bottom of the printed sheet, did you strike out the words that appear on that line?

A. Yes, sir.

• • • • •

Q. And what about on the fourth line from the bottom, did you strike something out and substitute something else for it?

A. Yes, sir.

Q. And on the 9th and 10th lines did you strike out words and substitute other words for them?

A. Yes, sir.

Q. And the 19th line from the bottom, did you strike out a word and substitute other words that changed the meaning of that sentence?

A. No, sir. I struck out a word.

Q. You struck out the word "myself," didn't you?

A. Yes, sir.

Q. And you added the words "For Meyer," didn't you?

A. Yes, sir.

Q. And you say that does not change the meaning of that sentence; is that your testimony?

A. Yes, sir, that is my testimony.

• • • • •

Q. From whom did you receive Exhibit S for identification?

A. I believe I received it from you.

Q. The first time you ever got it?

A. No.

Q. From whom did you receive it the first time you ever got it?

A. From Assistant District Attorney McKenna.

Q. Now, at the time were there any changes on the—

A. None of the changes that you pointed out so far.

[fol. 643] Q. Were there any changes on it, at all?

A. Yes, sir, these words in pen inserted.

Q. And the words that are inserted in pen are three words, aren't they?

A. Yes, sir.

Q. On the first page?

A. Yes, sir.

Q. And they are the words "And Ralph Berger," aren't they?

A. Yes, sir.

Q. And that was not there when Detective Reilly made this transcript, was it?

A. It is not a change, it is an insertion.

Q. An insertion?

A. Yes, sir.

Q. All right, an insertion on Detective Reilly's transcript, isn't that right?

A. Yes, sir.

Q. And that appears on the sixth line from the top of page one, right?

A. Excuse me?

Q. Well, does it appear there?

A. Yes, this is not part of the transcription of the conversation.

Q. Would you answer my question, please, is that what we have just talked about "And Ralph Berger," that was inserted, incorporated—does it appear at the 6th line from the top of page 1 of Exhibit S?

Mr. McKenna: I object, Mr. Brill is not attacking the authenticity of the transcript, that is merely identification of the parties in that conversation he is referring to, and I think this is wholly misleading.

Mr. Brill: Oh, not at all.

The Court: You may continue.

Mr. Brill: Thank you, sir.

Q. Is that right, that is on the sixth line of the first page of Exhibit S?

A. Yes, sir.

Q. All right, so that when you prepared 62 for identification, you had the benefit of Exhibit S and whatever you may have heard?

A. Yes, sir.

[fol. 644] Q. Right?

A. Yes.

Q. Last week when you were replaying the tape that you described, did you play it continuously for eight or ten hours?

A. No, sir.

Q. All right, how many times would you say, during the two or three hours on that day, did you have to make a playback? I expected an estimate, not the exact number of times, Detective.

A. I really could not even estimate that.

Q. It could have been a couple of hundred?

A. Could have been.

Q. Could have been?

A. Yes, we are not talking about complete playbacks.

Q. No, just playback, the number of times you had to have playbacks. Could have been more than a couple of hundred, couldn't it?

A. Well, I am not sure of the time.

Q. Yes?

A. I don't think it could have been a couple of thousand, I think a couple of hundred is the most.

Q. I see. Well, on the day that you were with Detective Feeley, you played it for five or seven hours.

A. I think the most was five hours.

Q. Now how many times would you say you played it over the five hours, had to play back, not of the whole tape but of portions of it?

A. It's really difficult to hazard a guess. It just would be—

Q. Five or six hundred times?

A. It could be that, could be much less.

Q. Could have been more?

A. Possibly.

[fol. 645] Q. Well, on that day did you find that it was a little tiresome?

A. I don't recall feeling tired.

Q. You can't say that you didn't, though, can you?

A. As a matter of fact, I do recall my physical feeling because I remember I was very excited, the mere fact that I had gotten a better estimation than the original.

Q. I see.

A. And—

Q. When you say "the original," you mean of what Detective Reilly had gotten an estimation of?

A. Yes, sir.

Q. Now did you play this on other occasions beyond, besides these two days which you have been describing to us?

A. I played it and heard it played on other occasions, yes, sir.

Q. How many times?

A. Many times.

The Witness: We're going back over a span of two and a half years, sir.

The Witness: Quite a number. Over a hundred.

Q. Well, over a hundred? Two hundred, maybe?

A. Oh, I'm sure, maybe—I can't really—

Q. And did you operate the machine on those occasions?

A. Some occasions I operated the machine.

Q. And on each occasion that you operated the machine on a playback, were you obliged to manipulate the volume controls?

A. Yes.

Q. And on days, on the different occasions when you played it back, did you hear or not hear some of the things [fol. 646] that you now have in Exhibit 62 for identification?

Q. So that the number of plays, running into hundreds, were necessary for you to be able to obtain what you have on that paper, now Exhibit 62 for identification?

A. No, sir.

Recross examination.

By Mr. Brill:

Q. With respect to Exhibit 62 for identification, on the second page, did you not show that there were places where you heard nothing?

A. I show here in one place where a small portion of the conversation was inaudible to me.

Q. Only in one place; is that your testimony?

A. Yes, sir.

Q. Now, you are looking at page 2?

A. Yes, sir.

Q. Now, at what line are you talking about, a small portion that was inaudible to you?

A. From the bottom, 13th from the bottom.



Q. Thirteenth from the bottom?

A. Yes, sir.

Q. Now, will you be good enough to look at the fifth line from the top. Do you see it?

A. Yes, sir.

Q. And there you found that there was a whole sentence inaudible to you?

A. Yes, sir, that is correct. I was mistaken.

Q. You were mistaken about that. Now, in addition to that, there were many or several places, rather, on this page where dots were interposed to show that there was a period when you heard nothing, isn't that right?

A. That is correct.

Q. How many places are there where there are such dots where you heard nothing?

[fol. 647] Mr. McKenna: What is the page?

Mr. Brill: Page 2.

A. I count eight, sir.

Q. Eight. All right. Now, will you look at page—and that is in addition to the inaudible sentence and the, to quote you, the inaudible portion of a sentence, is that right?

A. Yes, sir.

Q. All right. Now, look at page 3. Did you find that there was matter that you were not able to hear on the tape when you made Exhibit 62 for identification, having heard it several hundred times?

A. Yes, sir.

Q. How many places did you find were inaudible? You are looking at page 3, right?

A. Yes, sir. I count 5, sir.

Q. Now, do you also find that there were dots showing that there were places that you didn't hear what was on the tape, in addition to the five inaudible places?

A. Those dots, as I believe I have indicated, do not mean I didn't hear. It was that I distinctly heard nothing.

Q. Yes, that you heard nothing. That is what we are talking about.

A. Yes.

Q. And how many places are there where you heard nothing besides the inaudible places that you talked about?

A. I count eight.

Q. Eight. Now, will you look at page—

The Court: When you say you count eight, do you include the dashes?

The Witness: No, sir.

The Court: Just the dots?

The Witness: Yes, sir.

Q. And how many places—

The Court: Which indicate, as you said on a prior occasion in your testimony, pauses in conversation?

[fol. 648] The Witness: The dots are pauses, yes, sir.

Q. Now, have you told us how many places, besides the inaudible ones, that you marked, you found on page 3, where you heard nothing?

A. Three.

Q. Three. That's all?

A. Yes, sir. If I may add, sometimes you see one dash, sometimes—

Q. You are talking about page 3 now or page 4?

A. Page 3.

Q. Page 3?

A. Yes, sir.

Q. And you only find three places, where you didn't hear anything, where you have dots; is that what you are saying?

A. I think I just saw another one. I will correct that to four.

Q. Now, at page 4 did you find that there was material that was inaudible to you after the countless number of replays?

A. I only count one inaudible.

Q. One inaudible. Now, in addition to that, do you find places where you have indicated by dots that you can't hear nothing on the tape?

A. Six.

Q. Silent places, right?

A. Yes, sir.

Q. And that is on page 4. Now, will you go to page 5, please.

A. (Witness does as requested.)

Q. Tell us how many times you wrote the word "inaudible" because you didn't hear or were not able to understand what was said on the tape.

A. Five.

Q. Now, in addition to that, did you note with dots the places and times where you heard nothing on the tape?

A. Twenty-one.

\* \* \* \* \*

[fol. 649] Q. Now, will you look at page 6, please, and tell us in how many places you were unable to understand what was on the tape and which you identified as inaudible?

A. Two.

\* \* \* \* \*

Q. Now, in addition to that, how many places were there where you indicated by dots that you couldn't hear what was said on the tape?

\* \* \* \* \*

A. Fourteen.

\* \* \* \* \*

Q. Now, go to page 7. How many times did you show on page 7 that you were not able to understand what was being said on the tape?

A. Two times.

\* \* \* \* \*

Q. All right. Now, in addition to those two times, did you note that for twenty-five seconds everybody was talking at the same time?

A. Yes, sir.

Q. So that you were not able to understand what was being said at that time; is that true?

A. Well, it was a combination of—I understood part of it, sir, but I felt that what was being, what they were discussing, was so extraneous that I did not even bother to—

Q. This is what you felt?

A. Yes, sir.

Q. Right?

A. Yes, sir.

Q. All right. In other words, you were putting your own impressions in and you were governed by what you felt; isn't that true; can't you tell me?

A. Yes, sir.

Q. How many places were there on tape 7 in your transcription where you heard nothing, indicated by the dots?

A. Six.

[fol. 650] Q. And this is the transcription that you say is an accurate transcription, is that right?

A. Yes, sir.

Recross examination.

By Mr. Brill:

Q. Detective Berkowitz, I think you said that you heard, in connection with page 5 of your transcript, the telephone ring, is that right?

A. I think so, yes, sir.

Q. What?

A. There was several telephone calls at about this time.

Q. How many do you say?

A. Well, I recall at least three.

Q. Did you identify them as three telephone calls in your transcript?

A. I identified two of them.

Q. Did you eavesdrop on those telephone calls, also?

The Witness: Yes, sir.

Q. And did you include in your transcript, Exhibit 62 for identification, any of the conversation on which you eavesdropped in those two telephone conversations? Yes or no?

A. No, sir.

Q. Now, is there anything else on your transcript that shows that you eavesdropped on another telephone conversation, as you have identified the other two; yes or no? You are looking at it, aren't you?

A. May I turn back to page 4, there might be some identification.

Q. Certainly.

A. No, sir.

Q. Not at all?

A. No.

[fol. 651] Q. And this block of conversation that you talked about is not indicated as being part of a telephone conversation on your transcript, is it?

A. I did not so indicate it.

Q. No?

A. Yes, sir.

Q. No. Now, on page 4, at which you just looked, you found that at other times the telephone rang, too, didn't you?

A. Yes, sir.

Q. And you eavesdropped on these telephone conversations, too, didn't you?

A. Not necessarily.

\* \* \* \* \*

Q. Well, perhaps I can help you, the fourth line from the bottom; is that in addition—is that an indication in your transcript that somebody was engaged in a telephone conversation?

A. Yes, sir.

Q. And did you set forth the manner in which you eavesdropped in the course of that telephone conversation on that page, or in any other page in this transcript?

A. No, sir.

Q. Now, at the eighth line from the bottom, is there an indication that you overheard a telephone conversation?

A. I overheard one part of a telephone conversation, yes, sir.

Q. Did you set forth in the transcript the telephone conversation on which you eavesdropped in that connection on page 4?

A. No, sir.

Q. Now, isn't it true that you heard the telephone ring again earlier to that one that you just described? Well, look at line 11 from the bottom?

A. Yes, sir.

Q. On page 4?

A. Yes, sir.

Q. Did you set forth the content of any telephone conversation on which you eavesdropped in connection with that telephone ringing?

A. Sir?

Q. Yes, or no, please, Detective Berkowitz; did you?

A. I can't—I can't answer that question, not with a yes or no.

[fol. 652] The Court: You may give a full answer.

The Witness: This telephone ring concerns the prior telephone conversation that I answered to.



Q. So there were two conversations on page 4, then, right?

A. Yes.

Q. Two?

A. Yes.

Q. And you did not set forth any of the eavesdropping conversation on either of those calls on page 4 or any place else in this transcript; isn't that true?

A. That is true.

DETECTIVE WILLIAM REILLY, recalled as a witness on behalf of the People, having previously duly sworn, resumed the stand and testified further, as follows:

(A transcript was marked People's Exhibit 63 for identification.)

Direct examination.

By Mr. McKenna:

Q. Have you compared that transcript with the conversations of June the 28th, 1962, recorded on Reel 5483; just answer yes or no?

A. Yes.

Mr. Brill: I object to the whole line of inquiry, your Honor.

The Court: Your objection is overruled.

[fol. 653] Q. Is Exhibit 63 a true and accurate transcript of the conversation of June the 28th, 1962 that is recorded on Reel 5483?

Mr. Brill: Objection.

The Court: Overruled.

The Witness: It is.

By Mr. Brill:

Q. When did you last play it prior to the time that you prepared this document, 63 for identification?

A. On the morning of the 22nd.

Q. Who was with you at the time?

A. Detective Feeley and Detective Kirby.

Q. And did they assist you in the preparation of this document, Exhibit 63 for identification?

A. Yes, they did.

Q. You all heard it together at the same time. Now, did Detective Feeley make a contribution or a suggestion at a particular time?

A. Yes.

Q. And did the other detective—I missed his name. What was it?

A. Kirby.

Q. Did Detective Kirby make a suggestion as to what he heard at a particular time?

A. That's correct.

Q. And you made some suggestions?

A. That's correct.

Q. And you took the suggestions of all three of you and you called this your transcription of that tape. Isn't that right?

A. We transcribed it together.

[fol. 654] Q. I see.

A. I heard every word that's in that report.

Q. How many times before that had you listened to this tape?

A. Oh, possibly a half dozen or so times.

Q. That's all?

A. Roughly.

Q. Over how many hours would you say that happened?

A. At various times.

Q. Well, on each occasion. Can you give us an estimate of the number of hours?

A. Possibly six or eight hours.

Q. On each occasion?

A. Not on each occasion.

Q. Are you saying that you heard it for a total of eight hours prior to October 22nd?

A. Not at one sitting, no.

Q. No. A total of eight hours.

A. Roughly.

Q. And two hours on October 22nd.

A. That's correct.

Q. Now, had you anything else besides the assistance of Detectives Kirby and Feeley, when you prepared Exhibit 63 for identification?

A. We had the reel, the original reel and the tape recorder.

Q. And what else?

A. And the original transcript that was made.

Q. What original transcript?

A. There was a transcript made prior to this one that you're holding in your hand.

• • • • •  
(Whereupon, the document above referred to was marked Defendant's Exhibit T for identification.)

By Mr. Brill:

• • • • •  
Q. You didn't do Exhibit T?

A. No, no. That was made from my original. I didn't prepare this particular mimeographed form.

[fol. 655] Q. You didn't prepare that.

A. This is a copy of my original report.

\* \* \* \* \*

(Whereupon, fourteen yellow pages, with handwriting thereon, were marked Defendant's Exhibit U for identification.)

By Mr. Brill:

Q. Exhibit U for identification, consisting of fourteen pages, if I counted them correctly (handing to witness)—is that the document that you say was your original report?

A. That's correct.

Q. When did you make that?

A. This was made on the night of the 28th.

\* \* \* \* \*

The Witness: June.

Q. Of when?

A. 1962.

Q. All right. Now did you do this when you finished your tour of duty that day?

A. That's correct.

Q. How long had you worked on the plant that day?

A. Oh, possibly eight, ten hours.

Q. And after that, you sat down and wrote this.

A. That's correct.

\* \* \* \* \*

Q. Oh. And the very first time you replayed the reel you were able to write up this report?

A. That's correct.

Q. Just hearing it for the first time; right?

A. That's correct.

Q. And you got everything that was on that reel in this report. Is that your testimony?

A. At the time we assumed everything was in there. It appeared later we didn't have everything in here, and that was the reason for this new transcription that I have in front of me.

[fol. 656] Q. Excuse me, Detective Reilly. I want to know now, and I think the jury wants to know, also, whether when you wrote up Exhibit U for identification, you incorporated in it everything that you heard on that reel the first time you played it.

A. I believe so.

Q. And did you find, after you read it over, that you hadn't heard everything that you say was on that reel?

A. There was some inaudible words at the time of the original transcription.

Q. Some. And were there blank spaces that you didn't hear anything?

A. Occasionally.

Mr. Brill: Had you already finished Exhibit 65 for identification, when you testified here last week?

A. This was made on the 22nd, Thursday. I believe I had testified on Thursday or Friday.

Q. Now can you tell us whether that was finished before you testified?

A. I believe it might have been.

Q. All right. Now Exhibit U is the report that you say you made on the 28th, after some ten hours on the plant; right?

A. Approximately.

Q. Pretty tired at the time you wrote it?

A. After ten hours you usually get tired.

Q. You had been listening all day long; right?

A. Yes, sir.

Q. And you signed the names of Detectives Campbell and Berkowitz, as well as your own?

A. That's correct.

Q. Only to show that the three of you were there?

A. That's correct.

[fol. 657] Q. In other words, you didn't hear everything that was on the tape the first time you played it?

A. Not the inaudible words, no.

Q. Or inaudible places. Did you indicate how long the blank spaces were?

A. This was a rough copy, Mr. Brill, that was made at the time and we automatically assumed it would—

Q. Now when after June 28, 1962 did you make a less rough copy?

A. On the 22nd of October.

Q. In what year?

A. Of this year.

Q. Two years and four months, approximately, later?

A. That's correct.

Q. And in the interim, you say you heard the tape how many times?

A. Possibly, six or eight times.

Q. And when you made the less rough copy on June—on October the 22nd—we are now talking about Exhibit 65 in evidence—you had before you—

Q. (Continuing) —you had before you Exhibit U for identification, did you not (handing to witness)?

A. Yes.

Q. And Exhibit T for identification, did you not (handing to witness)?

A. Yes.

Q. And with the aid of those two and the two detectives, you were able to come up with 65 for identification. Is that right?

A. Plus a lot later equipment.



Q. Plus a lot later equipment?

A. More modern equipment at this time. When we did this last one on the 22nd—

Q. So you could hear more with the more modern equipment on October 22nd than you could with whatever equipment you had on June 28th, and the intervening dates that you listened up to October 22nd. Is that right?

A. It was later equipment, yes.

[fol. 658] Q. When did you get the later equipment?

A. The first time I had used it was on October 22nd, when I made that transcription.

Q. Well, on the 22nd, Detective Reilly, how long did you have possession of the tape?

A. The best part of the day.

Q. Between the time that you got it, and the time that you returned it, how many hours would you say elapsed?

A. Oh, possibly maybe six hours.

Q. Now you're suggesting that you took the tape out with you. Is that right?

A. No. It would be returned to the Tech room where we were working and transcribing on this reel.

Q. During the lunch hour?

A. That's right.

Q. You mean it would be left in that room.

A. That's correct.

Q. That's a room to which other people have access.

A. Only if you went in with an investigator with a key to open the door.

Q. But you already acknowledged, did you not, that other people have access to it?

A. Yes. Other people have access to it.

Q. Are you able to say truthfully that nobody else had access to that room and that tape while you were out to lunch?

A. I couldn't say that, no.

Q. No. So you don't know what happened to that tape at that time, do you?

A. No, I don't.

Q. I show you ten yellow sheets of foolscap. Is that what you are talking about as being the notes that you gave to the stenographer?

A. That's correct.

[fol. 659] (Whereupon, the ten yellow sheets, above referred to, were marked Defendant's Exhibit V for identification.)

Q. Whose handwriting is this?

A. I believe that is Detective Kirby's.

Q. He hadn't heard the 12 words that you wrote in, right?

A. Apparently not.

Q. That is why you put them in there, wasn't it?

A. That is correct.

Q. And you struck out the words that he wrote on the fifth line and the sixth line, and you wrote what you thought you heard on those lines in place of what he wrote?

A. What we had agreed to.

Q. Oh, you had agreed to this?

A. Yes, that's right.

Q. This was your joint impression, right?

A. That's right.

Q. And with respect to what was stricken out on the fourth line from the bottom, you agreed to your joint impression of what appears here that you wrote in, right?

A. That's right.

Q. You didn't write on 4-A?

A. No, I did not.

Q. And you wrote, after striking out what Detective Kirby wrote on the sixth line of page 4-B, you wrote the balance of the page, right?

A. That is correct.

Q. And that, too, is your joint impression?

A. That is correct.

Q. Of what you each believed you heard?

A. That is correct.

Q. And then you took that and put it together with Exhibit T, right?

A. That is correct.

Q. And you gave that to a stenographer?

A. That is correct.

. . . . .

[fol. 660] Q. And I notice that the reel number, 5483, appears at the top of page 4 in what looks like Detective Kirby's handwriting, right?

A. That is correct.

Q. And it looks like the No. 4 for page 4 was put in at a later time, doesn't it?

A. It doesn't.

Q. It doesn't?

A. That is the same handwriting, I believe.

Q. No, no. I mean it wasn't put in at the time that this was written, at the time the 5483 reel was written, was it?

A. I don't know.

Q. You didn't write it. Now, I see that that identification of Reel 5483 appears on page 1-B also. Do you notice that?

A. That is correct.

Q. And it doesn't appear on any of the other pages, apart from the ones I have mentioned to you, isn't that true? Right?

A. That is correct.

Q. Well, doesn't that indicate to you that these other pages were written up at later times after replaying of the tape several times?

A. No, Detective Kirby wrote those pages.

Q. I see.

A. I don't know what he put on the top of it.

Q. And you don't know how many times he heard the tape?

A. No, sir.

Q. Now, when you gave them to the stenographer, Exhibit V, along with Exhibit T for identification, did you strike out what was on this first page?

A. Yes, I did.

Q. You did. Is that your handwriting, the word "Heading"?

A. No, I believe that is Detective Feely's.

Q. So it took three of you to put your impressions together on this, did it?

A. That is correct.

Q. And the word "Inaudible," is that in your handwriting?

A. That is my handwriting there.

Q. That is something you couldn't hear?

A. That is correct.

[fol. 661] Q. Now, on the fifth line from the bottom of page 2 there is a word in ink over a typed word that was stricken out. Is that your handwriting?

A. Yes, it is.

Q. The word that was typed was "Look," wasn't it?

A. Yes.

Q. And what is the word you wrote there?

A. "Hey."

Q. Would you say that there was a similarity between those two words?

A. No, there is no similarity.

Q. I am talking about this one, the seventh line from the bottom, first. Doesn't that indicate that you wrote in these words to be stuck in there (indicating)?

A. Yes, that is correct.

Q. Which had not been heard or incorporated by whoever had prepared this transcript, Exhibit T for identification, right?

A. That was, like I said, made from the original, my draft,

Q. Are you suggesting, Detective Reilly, that Exhibit T is a copy of Exhibit U?

A. Partially.

Q. Well, now, let's get this straight. Is it a copy of Exhibit U? Is that a copy of this (indicating)?

A. The, some of the conversation; some of the conversation is.

Q. Well, for example, you didn't incorporate in T the first page and the second page down to the little asterisk that you have there on Exhibit T, did you?

A. No.

Q. "No." So at least to that extent it is not the same?

A. That is correct.

Q. All right. And a comparison of these two might well show that there are other places that are not the same, isn't that true?

A. They would be the same, but they were conversations that had no bearing on this printed matter here.

Q. Based upon your impressions?

A. That is correct.

[fol. 662] Q. Yes. And you made the selection and the choice, right?

A. That is correct.

Q. All right. Now, did you stick a word in the 12th line from the bottom?

A. Yes.

Q. Which was not there before?

A. That is correct.

Q. And which whoever heard and prepared the Exhibit T, which bears the names of Detectives Reilly, Campbell, and Berkowitz, had not put in in there?

A. That is correct.

Q. And they hadn't heard it?

A. That is correct.

Q. Right? And this language in the corner, on the margin on the left-hand side, in pencil, is that your handwriting, too?

A. No.

Q. You know whose it is?

A. I believe that is Mr. McKenna's handwriting. We—

Q. When did he stick that in there?

A. We heard these reels at the, at the original playing for Mister, for yourself, Mr. Brill.

Q. You mean for the Court, don't you?

A. For the Court.

Q. Last Thursday?

A. No, I believe it was prior to that.

Q. On the 15th of October?

A. I don't recall the date. We had the machine going on the table over there with the headphones.

Q. And Mr. McKenna wrote that in?

A. He apparently picked out that word, yes.

Q. Is this his handwriting? "That word" did you say? Aren't there three words in his handwriting?

A. Yes, three words.

Q. Page 2?

A. Yes.

Q. Now, is there anything on page 3 that is in his handwriting?

A. These notations here in pencil:

Q. For example, there are seven words in one notation in his handwriting, is that right?

A. That is correct.

Q. And there are eight in another notation?

A. Uh-huh. That is correct.

[fol. 663] Q. And a little notation, three words?

A. That is correct.

Q. And when do you say he did that?

A. I don't recall the exact date, but we were listening to the tape in open court here.

Q. In the absence of the jury?

A. In the absence of the jury, with headphones, and he heard these words.



Q. And he put them in?

A. That is correct.

Q. You did not hear them?

A. I didn't hear at that particular day.

Q. Did you hear them on a prior time?

A. No, not on a prior time.

Q. You had never heard them until he put them there, isn't that right?

A. That is correct.

Q. And you incorporated them in Exhibit 65 for identification, didn't you?

A. After hearing them myself, when I replayed it on the 22d of October.

Q. Uh-huh. After it was pointed out to you by Mr. McKenna, right?

A. That is correct.

• • • • •

Q. And did he also write on the 15th of October or after that date these words—eight?

A. That is correct.

Q. And you had never heard those words before, had you?

A. Not until we played it on that machine.

Q. And you hadn't put any of these things in any reports or any of the transcripts that you made out, Detective Reilly?

A. Prior to that time, no. Subsequent I heard it myself.

• • • • •

Q. These four words, "He'd run out of," is that what that says?

A. Yes.

Q. And in whose handwriting are those words?

A. Mr. McKenna's.

Q. And how about this one here in pencil (indicating)?

A. That is Mr. McKenna's also.

[fol. 664] Q. And how about these words below here, two words there (indicating)?

A. They are Mr. McKenna's also.

Q. And what about these three words down here on the line below that (indicating)?

A. They are his also.

Q. Now, what about at the margin on the left-hand side of this column, on the left-hand side, about a third of the page down, these words (indicating)?

A. They are Mr. McKenna's words.

Q. And what about this word (indicating)?

A. That is his writing.

• • • • •

Q. Now, on page 5 of Exhibit T there appears some handwriting in ink. Is that yours?

A. That is my handwriting.

Q. And did you stick these words, numbering 14 words, in after the word which appears on the seventh line from the top?

A. Yes, I did.

Q. And that is something which had not been heard by whoever made this transcript before, is that right?

A. That is correct.

Q. And this is your impression of what you heard?

A. That is correct.

Q. Changing the impression of whoever had heard it before, right?

A. It had been left out before.

Q. It had been left out. In other words, it hadn't been heard?

A. No, on, apparently on the original transcription, no.

Q. Now, are these other words in ink on this page 5 also in your handwriting?

A. That is correct.

Q. You changed words that were there and wrote in other words that you thought you heard?

A. That is correct.

Q. And these words in ink down at the bottom, are they in your handwriting, too?

A. Yes, they are.

Q. And you wrote those in?

A. Yes.

[fol. 665] Q. Incidentally, this has to do with a telephone conversation that you eavesdropped, doesn't it?

A. As an incoming call, yes.

Q. On page 5?

A. That is correct.

Q. And you listened in on that conversation?

A. I listened in on the office as Mr. Steinman was talking in his office.

Q. Did you have his permission to do that?

A. No, I did not.

Q. Now, let's come to page 6. Did you cross this all out (indicating)?

A. Yes.

Q. And did you write any of these words in pencil on the right-hand margin?

A. That is Mr. McKenna's handwriting.

Q. All of these words here (indicating)?

A. In pencil, yes.

Q. Four words, is that right?

A. That is correct.

Q. And this word that is in this sentence in here, in the 14th line (indicating)?

A. That is correct.

Q. That is in his handwriting as well?

A. I believe so.

Q. And what about the two words in the left-hand margin which appear four lines below his handwriting in the middle of that?

A. I believe that is his handwriting also.

Q. Did you see him write those in?

A. No. He gave it to me after the listening to the reel.

Q. I see. So that, in addition to the detectives, you had the assistance of Mr. McKenna in the preparation of what you now call an accurate transcription that you made of Exhibit 63 for identification, is that right?

A. In so far as these notes were made on the 20th, that is as far as Mr. McKenna aided us in the transcription.

Q. Well, to whatever extent, yet you had his help and you had the help of two other detectives besides yourself and several replays in order to write it, Exhibit 63, right?

A. That is correct.

[fol. 666] Q. And that took, it was the combined effort of, the impressions of all of you and it resulted from the transcription of Exhibits U, V, T—T, U, and V, right?

A. That is correct.

Q. Now, did you find, when you made Exhibit 63, for example—let me get a copy of it. Just hold that in front of you, please (handing), Detective Reilly, and tell me whether on the first page of Exhibit 65 for identification you indicated that there was matter that was indistinct to you and that you couldn't understand.. . .

A. Yes, there were some changes made on the first page.

Q. There were changes. Now, does it not also appear that there was matter that you didn't or were not able to hear or understand on page 1 of Exhibit 65 for identification?

A. There were several inaudible words that later became audible.

Mr. Brill: May the record show that where I referred to 65, it should be 63 for identification.

Can I make this a little clearer?

The Court: Yes. For the purposes of clarity, members of the jury, we are referring to that exhibit which the witness on his direct testimony indicated was an accurate statement of what he heard when he listened to the tapes on the multiple occasions on October 22, 1964, the last transcript.

Q. May we have an answer to the last question, Detective Reilly?

A. Would you repeat it, please.

(Thereupon, the Court Stenographer read the following:

"Q. Well, for example, did you not show on the eight line that there was inaudible material or inaudible matter before you could hear that on that line?")

[fol. 667] The Court: Referring, sir, to a particular line on Exhibit 63 for identification. I think you referred to the eighth line—

Mr. Brill: Yes, sir.

The Court: —where the word "inaudible" appears.

Mr. Brill: Right.

The Witness: That is correct.

Q. Can you honestly tell us how much of the material was inaudible?

A. No.

Q. Right?

A. No.

Q. Now, did you find that there was something else that was inaudible that you were unable to get transcribed from the tape, and which you so reflected on page 1 of Exhibit 63 for identification?

A. Yes.

Q. Can you tell us how much, or how many words were inaudible?

A. I could not tell you exactly how many words.

Q. Couldn't tell us?

A. No.

Q. Now, did you indicate, or give, some instructions to the stenographer who typed from all these papers that you have, Exhibits U, T and V, who typed up Exhibit 63 for identification, did you give her, or give him, some instructions?

A. Yes.

Q. Can you tell that—did you tell that person how to indicate places where you did not hear anything in the tape?

A. We had indicated on the original notes, she indicated exactly the same way.

Q. And you indicated by dashes and dots, did you not, isn't that true?

A. No, some of those were vulgar expressions that we had left out, the young female—

The Court: Strike it out, as not responsive to the question.

[fol. 668] Q. Did you understand that I was talking about matter that you didn't hear?

A. No.

Q. You didn't?

A. No, you said dots and dashes.

Q. Now, did you not reflect by dots and dashes matter that you did not hear?

A. No, we did not.

Q. You say that you did not indicate by dots and dashes places that you could not hear something on the tape; is that your testimony?

A. No, we did not, we put inaudible at that particular point.

Q. And that is the only thing that you used, is that right?

A. That is correct.

Q. And did you do that by agreement with Detective Berkowitz?

A. Yes.

Q. For example?

A. Yes.

Q. You and he agreed that when you didn't hear something you would merely write the word "inaudible", is that right?

A. That is correct.

Q. You would not make any indication by dots, for example?

A. No.

Q. And that was a clear understanding between you?



A. A clear understanding, yes.

Q. And that is the way you both prepared your transcript, right?

A. That is correct.

Q. All right. So that it would be your testimony that with respect to page 1 there are only two places where you did not hear anything on the tape, right?

A. That is correct.

Q. But there are several places on page 1 which have dots and dashes on them, right?

A. That is correct.

Q. Did they both mean the same thing, the dots and dashes?

A. No, they do not.

Q. Well, what is the difference, can you tell us?

A. On the original transcription of our notes?

Q. No, on this?

A. No, I am trying to bring this out, we instructed the typist to leave these words out and put the dots and dashes in there in its place.

[fol. 669] Q. I see, so you deliberately left out words that you say you heard and told the stenographer to put in dots and dashes, is that right?

A. That is correct.

Q. All right, now, look at Exhibit 63 for identification, look at the 13th line, right?

A. Uh, hum.

Q. Now, look at your original notes, whichever it was, and see whether or not there was something that you deliberately instructed the stenographer to leave out?

A. There is not.

Q. And aren't there two dashes along the last word, alongside of the last word in that line?

A. That is correct.

Q. And there is lots more space for that line to be continued, isn't there, after the dashes?

A. At the end of a sentence.

Q. It is—

A. Apparently.

Q. Are you guessing now, or are you saying positively that it is the end of the sentence?

A. I am looking.

Q. Are you saying that is the end of a sentence?

A. That is all that was on the note, apparently it was broken off.

Q. Well, look at your notes and see, please.

A. It was a broken off sentence, that is the way it was left.

Q. That is the way you heard it?

A. That is correct.

Q. In other words, you did not hear the rest of the sentence, or sentences; isn't that true?

• • • • •

The Witness: That is all I heard.

• • • • •

Q. So that when the dashes indicated whatever came after the last word before the dashes, you didn't hear it; isn't that right?

A. It indicates there was nothing after that.

Q. That you heard?

A. That I heard.

Q. That's right, nothing that you heard. You are not saying that there wasn't something else after that that [fol. 670] you didn't hear, are you?

A. If I heard it, it would be on the report.

Q. But you didn't hear it?

A. That is correct.

Q. Right, all right. Now, will you look at the third line below that and you find after the third word in that line there are dashes; does that mean the same thing, that there was something that you didn't hear?

A. No, it doesn't.

Q. Well, there is a difference between these dashes and the dashes you just described?

A. No, they are the same.

Q. Well, didn't you tell us about the other dashes that it meant there was something you didn't hear?

A. I did not say that, at all.

Q. What did you say?

A. I said it is the end of the sentence, apparently the words ended there.

Q. Well, do you end sentences with a period or with dashes?

A. It is not the end of a sentence. As far as I am concerned it is the end of that particular phase of the conversation that is written up here.

. . . . .

Q. All right. Now, from the bottom, the second line on the first page, you see that there are dots after the fifth word?

A. That is correct.

Q. Well, are those dots the same, do they represent the same as the dashes?

A. They would be the same.

Q. Something you didn't hear?

A. No, that is—

Q. The end of a sentence?

A. Apparently that is what it would be, a change of thought, apparently, on the part of those who said it.

Q. This is your impression?

A. That is correct.

Q. But you cannot say that there wasn't something said in the place where those dots appear, can you?

A. The next word was said after those dots.

Q. You say that positively, of your own recollection?

A. I certainly do, not to my own recollection.

Q. From your recollection?

A. From my reports.

[fol. 671] Q. Show me where in the report you have got that?

. . . . .

Q. Do you want that one, too (indicating)?

A. No.

Q. The second line from the bottom, after the fifth word—

A. I don't have these marks for that.

Q. You don't have it?

A. No.

Q. So you can't say whether there was anything that was on the tape, or not, isn't that true?

A. The next word would be on it.

Q. The next word after the dots?

A. That's right.

Q. But the dots may represent something you didn't hear?

A. It would indicate a chain of thought, possibly, that ended.

Q. You are speculating now, aren't you, you are just guessing, aren't you?

A. Yes.

Q. Now, can you give us some facts instead of guesses, Detective Reilly; can you say that there were not words there which are represented by these dots?

A. There were not words there, if there were not words there the word "inaudible" would have been written in there.

Q. You would not say that these dots are there because you didn't hear something, would you?

A. The typist might have put them in there.

Mr. McKenna: I object.

The Court: Sustained, as having already been answered.

Q. Very good, sir.

A. All right.

Q. Would your answer be the same with respect to the fifth line from the bottom where there are dots making up the words that appear on that line?

A. I would believe that would be the end of a train of thought, yes.

Q. You would guess that?

A. Yes.

Q. And would your answer be the same with respect to the eighth line from the bottom?

A. That is correct.

[fol. 672] Q. And at the seventh line from the bottom?

A. That would indicate that there was no conversation beyond that, because it was written in "not recorded".

. . . . .

Q. And the dots would indicate that the conversation was not recorded, isn't that right?

A. That is correct.

Q. And would your answer be otherwise, then, with respect to the tenth line; where you have two breaks of dots?

A. That is the chain of thought, too.

Q. A chain of thought, you believe?

A. Yes, sir.

Q. Is that a guess?

A. The typist put them in there.

Q. Without your instructions?

A. That is correct.

Q. And did you call her attention to it after it was typed?

A. No, I did not.

Q. You just left it as it was, whether it be misleading, or not, is that so?

A. I left them the way they were.

Q. The way the typist put it in on her own accord?

A. That is correct.

Q. And that would be true of the other places, as many as there are on this first page where there are dots?

A. No, it would not.

Q. It would not, I see.

A. No.

Q. Well, let's see. What about the—what about on the twelfth line, what would your answer be about that; do you know, or do you have to speculate?

A. That is another broken chain of thought.

Q. Broken chain of thought?

A. Yes.

Q. The typist put those in?

A. That is correct.

Q. Without instructions from you?

A. That is correct.

Q. And the same as on the line just above that?

A. Which line are you referring to?

Q. Just above the one you just looked at.

A. What?

Q. That is the 13th, is it—the 13th line from the bottom?

A. That is the end of a train of thought.

Q. That is speculation?

A. That's right.

[fol. 673] Q. And the typist put that in without instructions?

A. That is correct.

Q. Nothing in your notes to tell her what to do?

A. No.

Q. Would you say is true of all the other—would you say that is true of all the other dotted places then?

A. Absolutely not.

Q. No, they are not?

A. No.

Q. All right. Well, now, show me a place where you instructed the typist to put in dots on page 1?

A. I did not instruct her to put in dots, I instructed her to leave out the vulgar language.

\* \* \* \* \*

Q. Is that where you instructed the typist to put in dashes?

A. I didn't, I instructed her to leave out these particular vulgar words. I did not instruct her to insert anything in there.

Q. Well, you notice there are dashes as well as dots?

A. That is correct.

Q. And they are used in different places, right?

A. That is correct.



Q. Now, are you suggesting that the dashes on the 14th line from the top represent vulgar words?

A. No, that is the end of a train of thought.

Q. I see, those dashes represent the end of a train of thought?

A. Yes.

. . . . .

Q. Did you find after listening to the tape on the new equipment on October the 22nd, 1964, that there were still places on the tape that you could not hear?

A. This was still an inaudible—there were still inaudible words.

. . . . .

Q. In preparing Exhibit 63 from all of the reports and the transcript that you had, Exhibits U, T and V, and after listening to the tape on the new equipment on October [fol. 674] 22nd, did you find that in addition to the three inaudible places which you show on the second page, there was more matter on the tape that you could not hear and did not transcribe in Exhibit 63?

A. Anything we heard we transcribed.

. . . . .

The Witness: There were other inaudible words.

. . . . .

Q. Now, do you know how many inaudible words you did not hear on that better equipment on that date?

A. Not exactly.

Q. How about the 20th line from the bottom, the very first, at the beginning there where you write "inaudible", on page 2; can you tell us how many words you did not hear on that better equipment on October 22nd?

A. Not exactly.

Q. And it was something in that that you had not found in any of the other transcripts and all of the other listenings to and hearings of the tape; isn't that right?

A. That's right, it was still inaudible.

. . . . .

Q. Now coming down to Page 3, did you find that on October the 22nd, after listening with this new equipment and after using all of the prior reports and transcripts that you've already described, did you find that there were still things that you couldn't hear?

\* \* \* \* \*

Q. You mean you have written the word "inaudible" twice.

A. That's correct.

Q. You don't mean there were two words that were inaudible, do you?

A. No, there might have been more.

Q. So that when you conclude, as you did, in the last two lines of Page 4, that people had left the office, that [fol. 675] was a guess on your part.

A. I assumed this on the quietness of the office.

Q. You couldn't hear what was going on, then, could you?

A. That's right.

Q. For all you know, there might have been people at the far end of the room away from the mike who were carrying on a conversation in each other's ear, for example.

A. It's possible. I couldn't hear it, yes.

Q. You couldn't hear it. So you don't know what was said, if anything.

A. I don't know whether there was anybody in the room, either.

Q. That's right. But you don't know that there wasn't somebody in the room, do you?

A. That's correct.

Q. All right. Now, at Page 5 is that an eavesdropping telephone conversation that you have included in this transcript?

A. This is an eavesdropping from the offices of Harry Steinman. He was speaking.

Q. On the telephone?

A. That's correct.

Q. So it's an eavesdropped telephone conversation.

A. No, it's an eavesdropped office conversation.

Q. Well, don't you identify it as an incoming call?

A. That's correct.

Q. And don't you identify who are the parties to this telephone conversation?

A. From what Mr. Steinman said, yes.

Q. And neither of them was Mr. Berger. Isn't that true—from your own identification?

A. That's correct.

Q. And didn't you later on indicate that there was another phone call?

A. That's correct.

Q. But you didn't eavesdrop on that one.

A. That's correct.

Q. All right. You made the selection as to which should be eavesdropped on. . . .

A. Yes, I made the selection.

[fol. 676] Q. All right. Now did you find that, on October 22nd, having had the benefit of all the times you listened to the tapes and the examination of the transcripts previously made, that you were still not able to hear everything that you transcribed or that you indicated as coming from the tape at Page 6 of Exhibit 63?

A. Yes, there were inaudible words.

Q. And you don't know how many words there were.

A. No, I do not.

Q. And how many times or places did you indicate that there were things that you couldn't hear, on that page, that is.

A. Three times.

Q. Three times that you recorded, that is, by saying "inaudible."

A. That's correct.

Q. And you can't tell us how many words or phrases or sentences were inaudible.

A. No, I cannot.

[fol. 678]      Redirect examination.

By Mr. McKenna (Continued):

Q. Now, Detective Reilly, you say you prepared this transcript on October the 22nd; right?

A. That's correct.

Q. That's of this year.

A. That's correct.

Q. And do you recall testifying for Mr. Brill that you went to lunch on that date?

A. I do. I since have—

Mr. McKenna (To the witness): Wait a minute.

Can I have this marked People's Exhibit 64 for identification.

(Whereupon, a yellow sheet of paper with writing thereon was marked People's Exhibit 64 for identification.)

Mr. Brill: May I see it, please.

(Whereupon, People's Exhibit 64 for identification was handed to Mr. Brill by the court attendant, and Mr. Brill inspected same.)

By Mr. McKenna:

Q. Now I show you People's Exhibit 64 for identification. I specifically refer to the bottom line. Does that refresh your recollection as to whether or not you went to lunch on October the 22nd, 1964?

A. Yes, it does.

[fol. 679] Q. And did you go to lunch on October the 22nd, 1964?

A. We had sandwiches in that day. I didn't leave to have lunch on the outside.

## Recross examination.

By Mr. Brill:

Q. Is there anything on Exhibit 64 that indicates that you had sandwiches in that day?

A. No. I have an independent recollection of it.

Q. You have an independent recollection. Did you discuss the matter last night after you left court?

A. I tried to—

Q. Did you discuss the matter last night, after you left court, Detective Reilly?

A. No, not this specific thing, no.

Q. Not this specific thing?

A. No.

Q. And were you surprised this morning when Mr. McKenna, just a few minutes ago, asked you about that?

A. No, I was not.

Q. You expected to be questioned about it, didn't you?

A. I had mentioned it.

Q. When?

A. That I recall that I had gone out—that I had sandwiches sent in that particular day.

Q. When did you mention this?

A. I believe yesterday evening.

Q. Yes. Last night, after you left court.

A. That's correct.

Q. So you discussed it last night, after you left court, didn't you?

A. That's correct.

Q. Now with whom else, beside Mr. McKenna?

A. That's all I discussed it with. I had an independent recollection.

Q. You had an independent recollection that you had sandwiches. Now do you have an independent recollection of the number or kind of sandwiches?

A. I had one sandwich. I don't recall exactly what it was.  
[fol. 680] Q. You don't recall the kind. But there's nothing on Exhibit 64 for identification that refreshes your recollection.

tion as to the fact that you had a sandwich, if you had one, on that day, is there?

A. No, there is not.

. . . . .

DETECTIVE ANTHONY J. BERNHART, recalled as a witness in behalf of the People, having been previously duly sworn by the Clerk of the Court, was examined and testified further as follows:

Direct examination.

By Mr. McKenna:

Q. Detective Bernhart, is it not true that you testified previously that on June the 25th, 1962 you overheard Ralph Berger, Harry Steinman and Frank Jacklone in conversation at Kenny's Steak Pub?

A. Yes, it is.

Q. And you personally heard the voice of each of those three individuals?

A. Yes, I did.

Q. Now since that time, Detective Bernhart, have you had occasion to listen to a tape recording contained on Reel 5483?

A. Yes, sir, I did.

. . . . .

Q. Now I show you People's Exhibits 62 and 63 for identification. On that occasion that you listened to that reel yesterday, did you also have copies of Exhibits 62 and 63?

A. Yes, sir, I did.

Q. Did you compare these transcripts with the conversation you heard on Reel 5483?

A. Yes, sir.

Mr. Brill: I object to this, your Honor.

He didn't prepare these transcripts, and he is merely reading what he says he sees on the paper at a time when a tape is being played.



[fol. 681] This has no probative value and can only be inflammatory and prejudicial, to recall this witness for this purpose.

Mr. McKenna: It's being offered for the identification of the voices.

The Court: Objection overruled.

(To the witness) You may answer it, sir.

A. Yes, sir, I did.

Q. And where, on Exhibits 62 and 63, the conversation is designated as being that of Ralph Berger or Harry Steinman or Frank Jacklone, are those transcripts accurate, as far as Reel 5483 is concerned?

Mr. Brill: I object to it.

A. Yes, sir.

Mr. Brill: I move to strike the answer.

The Court: Objection overruled. I will allow it to stand.

A. Yes, sir, it is.

The Court: We are referring merely to the voices, to the persons identified on these transcripts as having spoken.

(To the witness) Did you recognize those voices?

The Witness: Yes, sir, I recognized their voices.

Mr. Brill: He didn't testify to that, your Honor.

His question was another question. That's what I objected to.

Mr. McKenna: I said were those voices—

The Court: Let's have the question read back.

I assumed that this was the purpose for which the witness was recalled.

Mr. Brill: It may have been; but that's not what his testimony was and that's not the question.

[fol. 682] The Court: May I hear the question.

(Whereupon, the question was read by the Court Reporter, as follows: "And where, on Exhibits 62 and 63, the conversation is designated as being that of Ralph

Berger or Harry Steinman or Frank Jacklone, are those transcripts accurate, as far as Reel 5483 is concerned?"

Mr. Brill: And I press the objection and move to strike the answer.

The Court: Implicit in the very question is reference to the voices of these persons.

However, we'll permit the district attorney to reframe his question so as to make it clearer.

Mr. Brill: I don't think it's a matter of clarity, your Honor. I think it's a question—

The Court: I'll sustain your objection.

Mr. Brill: Thank you.

The Court: Strike out the question and the answer.

Now reframe your question.

Sustained because of the form of the question.

By Mr. McKenna:

Q. Did you listen to Reel 5483?

A. Yes.

Q. And did you compare the voices you heard on Reel 5483 with the transcripts, 62 and 63? Answer yes or no.

A. Yes, I did.

Mr. Brill: Now, if your Honor pleases, I object to it.

The Court: I will allow it to stand.

Mr. Brill: He testifies he did this yesterday. This is two years and four months after the alleged event.

The Court: (To Mr. McKenna) Continue.

[fol. 683] By Mr. McKenna:

Q. Now in Exhibits 62 and 63, where there is a designation on those reels, on those transcripts, that Harry Steinman or Ralph Berger or Frank Jacklone is speaking, are those transcripts accurate, as far as the voice identification is concerned?

Mr. Brill: Now I object to it, if your Honor pleases.

The Court: I want to make a statement out of the hearing of the jury.

(Whereupon, the following proceedings took place on the record, at the bench, between the Court and counsel for both sides, but out of the hearing of the members of the jury:)

The Court: My recollection is that this witness had, on a prior occasion, testified that on June 25th, 1962 he was in Kenny's Steak Pub, seated at a table with two brother officers—

Mr. McKenna: —that's right.

The Court: —and that next to this table was seated the witness Frank Jacklone, one Harry Steinman and the defendant Ralph Berger.

He further stated that he overheard parts of a conversation engaged in by these three persons.

He testified today that on June 29th, 1962 he had the reel played back, and when I say "reel," I refer to the conversations purportedly recorded on the afternoon of June 28th and on the morning of June 29th. These conversations are represented in the two transcripts, heretofore marked People's Exhibits 63 and 62, respectively.

The question which is presently posed for the Court to determine is whether or not a voice identification, purportedly made under these circumstances, is sufficient to satisfy the requirements of law with respect to an accurate [fol. 684] identification so as to lay the foundation for the introduction of the recordings themselves.

Is that correct, Mr. McKenna?

Mr. McKenna: And the transcripts. Yes, your Honor.

The Court: Now on that limited issue, I will hear you.

Mr. McKenna: Your Honor, the witness has testified that he has heard Reel 5483. He has identified the voices on that reel, and he has also said that the transcripts—where the transcripts designate the voice speaking as that of Harry Steinman, Frank Jacklone or Ralph Berger, that those transcripts are accurate.

And I will ask him, further, at your Honor's direction, if those are the only voices on the tape.

Mr. Brill: Excuse me. I am not going to interfere.

The Court: The issue involved here is much too critical for me to make a summary determination at this time. When I say "critical," I mean it's important to the People, and certainly important to the defendant.

I would rather reserve decision on the defendant's motion at this time, and I am going to ask you to go to some other line of inquiry, if you desire to utilize this witness any further.

Mr. McKenna: I want to ask him as he listened to the conversation of June 28th, what voices did he hear; as he listened to the conversation of June the 29th, what voices did he hear, that's all.

Mr. Brill: The objection would be the same.

The Court: The objection would naturally be the same.

Mr. Brill: Yes.

[fol. 685] The Court: And I am required to make a ruling on it, and I will make a ruling on it, but at this time go to some other line of inquiry, if you have anything else that you desire to question him upon at this time.

Mr. McKenna: He's only being offered for the purpose of identifying the voices on that tape.

The Court: Then I will reserve decision at this time on counsel's objection.

Mr. McKenna: I just have to ask him, though, about the voices he heard on the tape.

The Court: That's the very issue involved.

Mr. Brill: That's the very question. The repetition of it makes it inflammatory.

Mr. McKenna: I've asked him so far if the designation of the voice on the transcript is that of Harry Steinman, Ralph Berger and Frank Jacklone are correct. That's as far as I've gone.

He says, "Yes."

The Court: Maybe I missed something here.

Mr. Brill: You didn't miss it, Judge.

•   •   •   •   •   •   •

Mr. Brill: The point is, permitting the district attorney to go over this time after time, with several police witnesses, creates the impression in the mind of this jury that there is something here, and it also generates an inflammatory and prejudicial atmosphere against the defendant because I, as a lawyer, am obliged to make objections, and it appears to the jury that I am trying to conceal something or withhold something that they might have a right to hear or see.

Now in these circumstances, the repeated return of police witnesses can only result in the denial of a fair trial to the defendant.

[fol. 686] The Court: Is this a statement that you are making, or an application to the Court?

Mr. Brill: No. It's an application to the Court that if your Honor permits this to go on, I am constrained to ask for the withdrawal of a juror and the declaration of a mistrial.

(Whereupon, the following proceedings took place, on the record, in open court):

. . . . .

The Court: Before you proceed, I want to put a statement on the record.

Let the record show that defense counsel has objected to the last inquiry and the Court has reserved decision on the objection.

Q. Detective Bernhard, you testified that you heard this Reel 5483 on June 29, 1962.

A. Yes, sir, that is correct.

. . . . .

A. On Plant 6276.

Q. Now, at that time did you identify the voices on Reel 5483?

A. Yes, sir, I did.

Q. Who else was present when you identified the voices on Reel 5483?

. . . . .

A. Detective Berkowitz and Detective Cronin.

Q. Whose voices did you identify as being on Reel 5483?

Mr. Brill: I object to it.

The Court: Overruled.

A. I identified the defendant, Mr. Ralph Berger, Mr. Frank Jacklone, and Mr. Harry Steinman.

Q. Now, when you listened to Reel 5483 yesterday, did you have a recollection in your mind of the voices that you had heard on June 25, 1962?

A. Yes, sir, I did.

[fol. 687] Q. And also the voices you had heard on June 29?

Mr. Brill: I object.

The Court: I will allow it. Overruled.

Q. The voices you had heard on June 29, 1962?

Mr. Brill: I object.

A. Yes, sir, I did.

The Court: I will allow it. Overruled.

Q. Whose voices did you hear on the reel, 5483, when you listened to it yesterday?

Mr. Brill: I object to it. This is what Your Honor has said he has reserved judgment on.

The Court: This is what the Court has reserved decision on.

• • • • •  
Cross examination.

By Mr. Brill:

• • • • •  
Q. And you want this Court and jury now to believe that without that transcript designating the voices—  
• • • • •



Q. —two years and four months later that you were able to identify the voices on the tape—

A. No doubt in—

Q. —is that your testimony?

A. There is no doubt in my mind that I could identify those voices without the transcript.

Q. But you didn't, did you?

A. No, sir, I did not.

Q. And you went in armed with the transcripts to listen to the tape?

A. That is correct.

[fol. 688] Q. And you knew before the tape was turned on whose voices you expected, you would hear, didn't you? Didn't you, Detective Bernhard?

A. Yes, sir, I would say so.

. . . . .

(The following proceedings took place at the bench in the presence of the Court, Mr. McKenna, Mr. Goldstein, and Mr. Brill, but without the hearing of the jurors and the alternate jurors.)

Mr. Brill: Now, Your Honor, I object to the recalling of Detective Cronin for the purposes indicated by the District Attorney, that he will attempt through the testimony of this witness to identify voices on the reel in question in order to establish that they are the voices reflected on the transcripts, Exhibits 62 and 63 for identification.

Here again you have a police officer recalled in a series of police officers ostensibly for the same purpose—to identify voices some two and a half years, two years in the case of Detective Cronin, whose testimony, as I recall it, was, in substance, that he met and talked in the City of Chicago with the defendant Ralph Berger, and he is now called for the purpose, ostensibly, of identifying that voice as being the voice which he heard within the last two days on this tape and from which these transcripts purportedly have been made.

I recall further that representation was made by the District Attorney that Detective Cronin heard the tape on

June 29; but even with regard to that, there is no testimony that between June 29 and December 10 or 11 of 1962 Detective Cronin ever saw or talked with the defendant so that he was able to fix the identification of the voice. Here we have a period of some six months, which is a period so remote as to make the voice identification unreliable; and [fol. 689] to permit this man to testify, clothed as he is with a shield, before this jury creates a further inflammatory and prejudicial atmosphere which results in the denial of a fair trial to the defendant.

His testimony has no probative value, not at all.

Mr. McKenna: I am not offering him for what he heard before December 10. I am offering him so that he will testify he had a conversation with Ralph Berger on December 10; subsequent to that time he listened to this reel and that is Ralph Berger's voice on that reel. That is all I am offering him for.

The Court: Objection overruled.

. . . . .

HENRY M. CRONIN, Police Detective, Police Department of the City of New York; recalled as a witness on behalf of the People, having been previously duly sworn, resumed the witness stand and testified further as follows:

Direct examination.

By Mr. McKenna:

. . . . .

Q. Detective Cronin, is it not true that you testified previously—

A. Yes, sir.

Q. —that on December 10 you had a conversation with the defendant, Ralph Berger?

A. I did, sir.

Q. And that is 1962, is that correct?

A. That's right, sir.

. . . . .

Q. Do you remember when it was after December the 10th, 1962 that you listened to Reel 5483?

[fol. 690] A. After I returned to New York City on December the 12th, it was either the 13th or the 14th.

Q. Did you recognize one of the voices on Reel 5483?

A. I did, sir.

Q. Whose voice did you recognize?

A. Ralph Berger.

Mr. Brill: I object to that.

Q. Did you listen to conversations on Reel 5483 that occurred both on June the 28th, 1962 and June the 29th, 1962?

A. I did, sir.

Q. You listened to both conversations, is that correct?

A. That's right.

Q. And did you recognize a voice in both of those conversations?

A. Ralph Berger.

Q. I show you Exhibits 62 and 63 for identification.

A. Yes, sir.

Q. Have you seen these transcripts before today?

A. Yes, I did.

Q. Did you listen to Reel 5483 yesterday?

A. I did, sir.

Q. Did you compare the transcripts, 62 and 63, with the conversation on Reel 5483; answer yes or no?

Mr. Brill: I object.

The Court: I will allow it, you may answer yes or no.

The Witness: Yes.

Q. Did you compare transcripts 62 and 63 in so far as they recount what Ralph Berger is saying with the voice of Ralph Berger on Reel 5483?

Mr. Brill: I object to that, if your Honor please.

The Court: I will allow it.

The Witness: Yes.

[fol. 691] Q. And on the transcript, 62 and 63, where the voice of Ralph Berger is indicated as speaking, is it true and accurate, is it a true and accurate recording of what, in fact, is the voice of Ralph Berger on Reel 5483?

Mr. Brill: I object to that.

The Court: Overruled.

The Witness: Yes, sir.

• • • • •  
Cross examination.

By Mr. Brill:

Q. When did you hear this tape played for the last time?

A. This morning, sir.

Q. Where did you hear it played this morning?

A. In Room 666, sir.

Q. Who else was present at the time—

A. The District Attorney's Room.

Q. Who else was present?

A. Mr. Mahoney, Detective Berkowitz, and Mr. Jacklone.

• • • • •  
Q. Now, when before yesterday did you last hear this tape, before this morning I mean? I beg your pardon?

A. Yesterday morning, sir.

Q. Yesterday morning?

A. That is when I received one of these and I read it along with the tape that was being made.

Q. You are referring to Exhibit 62 and 63 for identification?

A. Yes.

Q. Did you have one of those with you this morning when you heard it played?

A. Not me, no, sir, I didn't.

Q. Not you?

A. No.

Q. Who had it then?

A. Mr. Jacklone.

Q. It was given to him so that he could pick out voices, is that right?

A. No, sir.

[fol. 692] Q. Who gave it to him?

A. Detective Berkowitz, sir.

Q. Tell us why you had those transcripts in front of you yesterday when you were listening to the tape?

A. So I could read along with what was being said.

Q. You were reading it as the tape was being played?

A. I was listening to the tape and I was reading this, also, sir.

Q. Oh, I see. Now, did you, Detective Cronin, find that there were on Exhibits 62 and 63 the names or initials of the persons who were supposed to be speaking?

A. Yes.

Q. And you were able to follow it without looking at the names on the tape?

The Witness: Well, I did not pay much attention to the names, sir.

Q. You didn't pay much attention to the names?

A. That's right, sir.

Q. I see, but you were reading what was said alongside of each name, weren't you?

A. Yes, sir.

Q. So that you saw each name as you looked at what you were reading; isn't that true?

A. I could see it.

Q. All right, it is your testimony now that some two years after, or nearly two years after you saw and talked

with Mr. Berger in Chicago, you had a clear impression and recollection of his voice; is that right?

[fol. 693] Q. Now, did you hear these reels yesterday and this morning on the same machine that you say you heard them a couple of years ago?

A. That I wouldn't know, sir.

Q. Would you say that the reception that you had yesterday and this morning was as good as the reception you heard in June or December, or whatever it was, of 1962?

The Court: Was it as good when you listened to the recording yesterday and today as it was on the occasion that you listened to it in December of 1962?

The Witness: I did not notice much change in it.

Q. You would say that it was the same in December and June of 1962, in so far as your ability to hear, as it was yesterday and this morning; is that right?

The Witness: That's right, sir.

Q. So it was as clear as a bell to you in June and December of 1962, is that right?

The Court: Was it as clear as a bell to you?

The Witness: It was as clear now as it was then.

Q. Was it as clear then as it is now?

A. To me, it was, sir.

Q. Did you ascertain the purpose for which Mr. Jacklone was there?

Mr. McKenna: Objection, your Honor.

The Court: Sustained.



[fol. 694] Q. By the way, when you made the investigation of Mr. Berger in 1962, didn't you ascertain that he had never been convicted of a crime?

Mr. McKenna: Objection, your Honor.

The Court: Don't answer that.

. . . . .

JAMES J. MAHONEY, 155 Leonard Street, New York City, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKenna:

Q. Mr. Mahoney, what is your occupation?

A. I am the supervising investigator with the District Attorney's Office.

. . . . .

Q. What are your duties as supervising investigator?

A. Well, I have charge of the issuing of tape recording reels and assignments for the investigators, and so forth.

. . . . .

Q. And do you keep records pertaining to the giving and reception of tape recording reels by the District Attorney's Office?

A. Yes, sir.

. . . . .

Q. Is there a policy with regard to the opening of the steel cabinets in which the reels are stored?

. . . . .

The Witness: The policy is the party, or person, who wants to obtain a reel must be accompanied by myself, usually myself, or Mr. Scanlon, or Mr. Fay. I will obtain the file keys and open the door to the Technical Room, open the locked steel cabinet and hand to the person who

[fol. 695] requested the reel the reel—at that time there is a record made of it.

Q. Now, if a person removes a reel, or if a reel is removed from the Technical Room, itself, is there a record made of such a removal?

A. Yes, sir.

Q. Now, on what date do your records reflect that Reel 5483 was given out?

A. June the 18th, 1962.

Q. On what date was that reel returned to you?

A. On July the 2nd, 1962.

Q. Now did you bring with you all the cards that reflect the signing out of Reel 5483, after July 2nd, 1962?

A. Yes, sir.

(Whereupon, the eight cards, above referred to, were marked People's Exhibit 66 for identification.)

Q. Detective—I'm sorry, Investigator Mahoney, did you cause to be made an abstract of the signout dates with regard to Reel 5483 from the cards that are now Exhibit 66?

A. Yes, I did.

Q. I show you People's Exhibit 64 for identification. Is that the abstract that you caused to be made with regard to the signing out of Reel 5483?

A. Yes, sir.

Q. Now will you give us the dates that the Reel 5483 was signed out of the tech room.

Mr. Brill: May the record show he is reading from Exhibit 63 for identification.

[fol. 696] A. Thank you. The first date the reel was signed out was 1/2/63. The next date was 1/9/63. The next date was 9/8/64. The next date was 9/10/64. The next date was 9/29/64. The next date was 10/1/64. The next date, 10/25/64. The next date was 10/5/64. The next date is 10/15/64. The next date is 10/17/64, 10/19/64, 10/19/64 again, 10/20/64, 10/21/64, 10/22/64. Now I have to refer to these cards. The next date it was signed out was 10/23/64. The next date is 10/26/64. The next date is 10/27/64. The next date is 10/28/64.

Q. Now you testified previously, have you not, that 10/23/26/27/28/64 the reel was in your possession in the witness room? Is that correct?

A. Yes, sir.

Q. Now who took the reel out on January the 2nd, 1963?

A. Detective Cronin.

Q. Who returned it?

A. Detective Cronin on the same day.

Q. On January the 9th, 1963?

A. Detective Reilly.

Q. And who returned it?

A. On the same date, Detective Reilly.

Q. And on September the 18th, 1964?

A. September 18?

Mr. McKenna: The 8th. I'm sorry.

A. Detective Kirby.

Q. And who returned it?

A. On the same date, Detective Kirby.

Q. And on the other dates would you go down the list, please.

A. On 10/10/64, Detective Kirby took it out. He returned it the same date.

On 9/29/64 Detective Kirby took it out, returned it on the same date. All the way down, 10/9/64, Detective Berkowitz took it out and returned it the same date.

On 10/2 Detective Berkowitz took it out. He also returned it on the same date.

On 10/5 Mr. Mahoney took it out and returned it on the same date.

[fol. 697] 10/15 Detective Feeley took it out and returned it the same date, by Detective Feeley.

On 10/17/64 Detective Berkowitz took it out and returned it at 10/19/64.

On 10/19/64 Detective Berkowitz took it out and returned it on 10/19/64.

On 10/19/64 Detective Berkowitz took it out again and returned it the same day.

On 10/20 Detective Berkowitz took it out and Detective Berkowitz returned it the same day.

On 10/21/64 Detective Berkowitz took it out. On 10/22 Detective Berkowitz returned it.

On 10/22/64 Detective Reilly took it out and returned it on 10/22/64—by Detective Reilly.

Q. Do you have Reel 5483 with you?

A. Yes, sir.

(Whereupon, the witness handed box containing reel to Mr. McKenna.)

Mr. McKenna: And that's People's Exhibit 16 for identification.

---

JAMES J. MAHONEY, continued:

Cross examination.

By Mr. Brill:

• • • • •  
A. No, I can't.

Q. Now were there duplicates made of the tape?

A. Yes. I think my records reflect there was a duplicate made, yes, sir.

• • • • •  
Q. Will you tell us when, where, and by whom it was made.

A. I gave a blank, unused roll to Detective Campbell on 12/26/62, and the records show it was brought back to me on 12/28/62 by Detective Haughie, and I have a notation [fol. 698] here that is a re-recording of Investigation Bureau Reel 5483.

Q. That is just what somebody told you, isn't it?

A. That is what my records reflect.

. . . . .

Q. You don't know who actually made the recording?

A. It is my understanding that Detective Haughie did it.

Q. I say you don't actually know who made it, do you?

A. No, sir. No, sir.

. . . . .

Q. The reel with the—

A. The number is 5899.

Q. —tape on it, which you say you got back on December 28, '62, how many times did that leave your possession?

Mr. McKenna: Your Honor, the re-recording, I don't think it has any relevance to this case at all.

. . . . .

Q. How many times?

A. On one occasion, sir.

Q. When and to whom?

A. I gave it out to Detective Campbell on 1/2/63. It was returned on 1/2/63 by Detective Campbell.

. . . . .

Q. All right. Now, these locked files or cabinets that you have described to us, they are ordinary filing cabinets, aren't they?

A. Yes, sir.

. . . . .

Q. And is there anything special about the key to the Tech Room?

A. Yes, sir.

Q. In its design?

A. No, sir, I don't—It is an ordinary key; it is a key.

Q. An ordinary key, capable and susceptible of duplication?

[fol. 699] A. Yes, sir, I would say so.

Q. And you can't say how many keys there are available, other than the ones that you have described, to the lock or to the steel cabinets that have locks on them, can you?

A. No, sir.

Q. Now, I notice from Exhibit 64—64 is the yellow sheet, a summary.

A. I haven't got that, sir.

Q. What did you do with that?

Mr. McKenna: I have it.

Q. I notice from exhibit 64 that on these various dates various people had this reel which you now refer to as Exhibit 61 for identification.

The Court: For the record: If you want some clarification, I believe this testimony is merely to the effect that he keeps a bookkeeping entry each time the reel is released to a person authorized to receive it and when it is returned, and he has already indicated he has no awareness of what happens to the reel while it is out.

Mr. Brill: Well, I think I can show it more specifically from his own records.

Incidentally, I would like to offer 64 for identification in evidence.



[fol. 700] (The paper referred to, previously marked People's Exhibit 64 for identification, was admitted in evidence and marked Defendant's Exhibit W.)

Mr. Brill: May I read it to the jury?

The Court: You may, sir.

Mr. Brill (Reading): "Reel No. 5483, Sign Out Record.

"Date Out: 1/2/63, Reel given to Cronin.

"Date In: 1/2/63, Reel returned by Cronin; Received by Mahoney.

"Date Out: 1/9/63, given to Reilly.

"Date In: 1/9/63, returned by Reilly; received by Mahoney."

"Date Out: 9/8/64, given to Kirby.

"Date In: 9/8/64, returned by Kirby; received by Gould.

"9/29/64, given to Kirby.

"9/29/64, returned by Kirby; received by Gould.

"10/1/64, to Berkowitz.

"Returned 10/1/64 by Berkowitz; received by Robinson.

"Out: 10/2/64, to Berkowitz.

"In: 10/2/64, from Berkowitz; received by Robinson.

"10/5/64, Mahoney.

"In: 10/5/64, Mahoney; received by Mahoney.

"10/15/64, Feely.

"In: 10/15/64, Feely; received by Gould.

"Date out: 10/17/64, Berkowitz.

"Date in: 10/19/64, returned by Berkowitz; received by Mahoney.

"Out: 10/19/64, Berkowitz.

[fol. 701] "In: 10/19/64, Berkowitz; received by Mahoney.

"10/19/64, Berkowitz.

"In: 10/19/64, returned by Berkowitz; received by Mahoney.

"10/20, out, Berkowitz.

"10/20, in, returned by Berkowitz; received by Mahoney.

Q. Did you ascertain from Detective Berkowitz where and what persons had possession of the reel during the two days from October 17, 1964, to October 19, 1964, when you charged it out to him and when he returned it to you?

A. No, sir, I did not.

Q. Did you ascertain from Detective Berkowitz where and what persons had possession of the reel from the time he took it out on October 21, 1964, until the time that he returned it to you on October 22, 1964?

A. No, sir, I did not.

The Court: And is that equally applicable to everyone whose name appears on this sheet?

The Witness: Yes, sir.

Mr. McKenna: With the Court's permission, your Honor, I am going to call the detectives whose names are on Defendants Exhibit W, just to establish the chain.

The Court: I assume your inquiry will be comparatively brief with each one?

Mr. McKenna: That's right, your Honor.

[fol. 702] DETECTIVE WILLIAM REILLY, recalled as a witness on behalf of the People, having been previously duly sworn, resumed the stand and testified further, as follows:

Direct examination.

By Mr. McKenna:

Q. Detective Reilly, did you take out Reel 5483 from the Tech Room on January 9th, 1963?

A. I believe I did.

Q. Did you return it on that day?

A. I did.

Q. During the time you had that reel did you do anything with that reel?

A. I played it.

Q. Did you erase, or delete, or make any additions to that reel?

A. I did not.

Q. October the 22nd, 1964, did you take out Reel 5483 from the Tech Room?

A. I did.

Q. Did you return it on that date?

A. I did.

Q. During the time you had it what did you do with it?

A. I played it.

Q. Did you erase, delete, or make any additions to that reel?

A. I did not.

DETECTIVE DONALD C. KIRBY, Shield 2833, District Attorney, New York County, Office Squad, Police Department, City of New York, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKenna:

Q. Detective Kirby, do you recall taking from the Investigation Bureau Reel 5483?

A. Yes, sir.

[fol. 703] Q. Do you recall the dates on which you took that reel from the Investigation Bureau?

A. September the 8th, September the 10th.

The Witness: 1964.

Q. While you had the reel in your possession did you make any additions, deletions or erasures to Reel 5483?

A. No, sir, I did not.

Q. Well, can you tell this Court and jury how many times you played it over in whatever length of time you had it?

A. I would say I played it through once and read from the original plant report.

Q. You mean the report that was made by Detective Reilly?

A. That's right, Detective Reilly.

Q. Did you ever make a transcript?

A. Of this reel?

Q. Yes.

A. Yes, sir, I have portions of it transcribed—I have portions of the transcript.

Q. When did you do that?

A. I believe it was on October 22nd, with Detective Reilly and Detective Feely.

Q. And at that time was there some discussion among you about what you had written?

A. About what I had written, sir?

The Witness: Yes, there was a discussion.

Q. And, as a matter of fact, weren't changes made on what you wrote down as to what you thought you heard?

A. Yes, sir.

[fol. 704] Q. Have you ever seen Exhibit B for identification, before?

A. Yes, sir. I have.

Q. And as you look through those sheets, do you find that some of them are in your handwriting?

A. These in printing are mine, all the printed sheets are mine.

. . . . .

Q. How about the third sheet, numbered 1-B?

A. That is my writing.

Q. Your writing?

A. Yes.

Q. Now, do you find that some of your writing has been stricken out?

A. Yes, sir.

Q. And somebody else's writing is written in above it?

A. Yes, sir, that is the same date, sir.

. . . . .

Q. Now when you listened to the tape, you heard the word "who's"; right?

A. On this portion of it, yes.

Q. And then the three of you agreed that instead of "who's", that the words should be "we are not"; is that right?

A. We wanted to have every word distinctly correct.

Mr. Brill: All right.

Q. And when you heard it distinctly, it came out "who's," but after the three of you agreed upon it, it was "we are not." Is that right?

A. When I heard it the first time, it sounded like "who's."

. . . . .

Q. Good. Now on the page numbered "1-C" was something in your handwriting stricken out?

A. Yes. Four words.

Q. Four words. And they read "He says it's all right."

A. That's right.

Q. Now did the three of you agree that that was not right?

A. That's right.

[fol. 705] Q. And that you should write something else in?

A. That we write what we heard.

Q. What you heard was, "He says it's all right." Isn't it?

A. The first time we played it.

Q. That's what you heard.

A. That's right, sir.

Q. But after the three of you got together, it read, "You'd think he'd call back."

A. That's exactly right.

• • • • •

Q. Here's page 4. Is that your writing?

A. Yes, sir, it is.

• • • • •

Q. Uh-huh. The four words that you wrote, and which were stricken out after the three of you agreed, were "went to the doctor's." But then the three of you agreed to say, instead, "once it's adopted."

A. That's right.

Q. That's not quite the same is it?

• • • • •

A. No, sir, they are not the same.

Q. Now, on the first, second, third, fourth, fifth line of Page 4, in your handwriting, is there something else that you wrote that was stricken out?

A. Yes, sir.

Q. And there are three words stricken out; right?

A. That's right.

Q. And in its place are written, one, two, three, four, five, six words. Right?

A. One, two, three, four, five words, right.

• • • • •

Q. Six words; right? The next line below, in your writing, there are one, two, three, four words stricken out. Right?



A. That's right.

Q. And in their place is written one, two, three, four, five words.

A. Yes, sir.

[fol. 706] Q. They are not the same words, are they?

A. No, sir.

. . . . .

Q. Now on the third line, after the second word, there are one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve words. Right?

A. Yes, sir.

Q. Which were written in?

A. That's right.

Q. After you wrote the thing out.

A. That's right.

Q. And you hadn't heard those first.

A. That's right.

Q. And the three of you agreed you ought to put those twelve words in; right?

A. They were there.

Q. All right. You agreed to it. Isn't that right?

A. (No response.)

Q. Now one, two, three, fourth line from the bottom; right?

A. Yes, sir.

Q. Is there something that you wrote there that was stricken out (indicating)?

A. Yes.

Q. And then, as a result of the conference among you, did you write in one, two, three, four, five, six, seven, eight words?

A. Yes. But here, you see, I have an "inaudible" here (indicating).

Q. I see. Part of it you didn't hear.

A. Part of it, until we replayed it to make out the words, this is what we have (indicating).

. . . . .

Q. And after that you had "inaudible." You only heard the first three words.

A. Right.

Q. And then, after the three of you decided upon it, you wrote in all these words and struck out "inaudible" (indicating); right?

A. Right.

Q. Did you find there was a word or two added here and there on this one? For example, on the last line was there a word added?

A. "Dollars," right.

[fol. 707] Q. And one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve—the twelfth line from the bottom is there a word added that you didn't have (indicating)?

A. Yes.

Q. And on the thirteenth line from the bottom is there another word added that you didn't have (indicating)?

A. Yes, sir.

Q. And there was some of that that was inaudible to, you, wasn't there?

A. Yes, sir.

Q. Now, did you have something before you at the time that you played this on that date?

A. Yes, we did.

Q. What did you have?

A. I believe we had a transcript that had been made up by—I think—Detective Reilly had made up a transcript.

Q. Is that Exhibit T for identification (handing to witness)?

A. Yes, this is it.

Q. And there were changes made in that, as well, weren't there, on October 22nd?

A. That's right, yes.

Q. Did you also see Exhibit S for identification (handing to witness)?

A. Yes, sir, I've seen this. I can't tell you when I saw it, but I've seen it.

DETECTIVE JOSEPH W. FEELEY, Shield No. 120, attached to the District Attorney's office, Squad, from the Police Department of the City of New York, called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct examination.

By Mr. McKenna:

[fol. 708] Q. During the time you had it in your possession on October 15th, 1964 did you make any additions, deletions or erasures in Reel 5483?

A. No, sir.

Mr. Brill: I have no questions.

SYDNEY BERKOWITZ, recalled as a witness in behalf of the People, having been previously duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct examination.

By Mr. McKenna:

Q. While you had the reel in your possession, did you make any additions, deletions or erasures on Reel 5483?

A. No, sir.

Cross examination.

By Mr. Brill:

Q. What time of the day on the 28th of June did you take the reel off the machine?

A. Must have been late at night, sir.

Q. Yes. Before you put it in the box that day, that night, late at night, did you play that reel?

A. Yes, I played it.

Q. On the same machine on which it was recorded. Is that right?

A. I believe so.

[fol. 709] Q. Is there some doubt in your mind about it?

A. There may have been another machine at the plant. If there was another—

Q. How many were there at the plant? How many machines were there at the plant?

A. There may have been another machine just for playbacks. I can't—I am not absolutely sure now. I have been, I have been, I have worked at a lot of plants and some of the plants had one machine, some have had two, and an extra machine just for playbacks. I am not absolutely sure. I don't recall exactly.

The Court: Can you recall, sir, whether you made any observation in that report as to how many machines you had in the plant?

The Witness: No, sir.

Q. Now, when you put it back the next morning, on the 29th, did you put it back at the beginning?

A. No, sir. At the beginning of the reel you mean?

Q. Yes.

A. No, of course not.

Q. Did you play the reel?

A. Yes, sir.

Q. Before you put it back?

A. Yes, sir.

Q. And then did you start it for recording purposes immediately where it ended the day before?

A. Either immediately where it ended or maybe a couple of lines after.

Q. Did you make a record of the lines at which you started?

A. Unfortunately, the machine that we were using did not have a number indicator on that particular machine.

Q. The answer would be no, you didn't make any record of the lines on which you started on the 29th.

A. That is correct.

[fol. 710] Q. And was the same thing true on the morning of the 30th?

A. Yes, sir.

Q. Didn't make a record of the lines at which you started, right?

A. No, sir.

Q. And you kept this reel with whatever was on it in your home each night?

A. Yes, sir.

Q. Right? Until the following week, when you brought it in?

A. Yes, sir.

Q. Did you keep it sealed each night?

A. Not each night, sir.

Q. Between the 28th and the day that you returned it, whatever date that was, the following week, was it sealed each night?

A. It was only sealed on one of those occasions.

Q. Which one was that?

A. On the 30th.

Q. The 30th?

A. Yes, sir.

Q. It was not sealed on the night of the 28th?

A. No, sir.

Q. It was not sealed on the night of the 29th?

A. No, sir.

Q. What did you do with the seal that was on it the night of the 30th?

A. After I brought it, after I turned it in to the investigator in the office, I broke it.

Q. And threw the seal away?

A. I don't recall if I threw it away.

Q. Do you still have it?

A. The seal?

Q. Yes.

A. No, sir. It is not an official seal, just a piece of cellophane.

Q. Something to seal it with; of course, not official.

A. Scotch tape, piece of Scotch tape.

. . . . .

[fol. 711]

FRANK JACKLONE, a witness on behalf of the People, having been previously duly sworn, resumed the witness stand and testified further as follows:

Direct examination.

By Mr. McKenna:

Q. Mr. Jacklone, have representatives of the District Attorney's office played for you Reel 5483, purportedly a conversation that occurred on June 29, 1962, in Harry Steinman's office?

Mr. Brill: I object.

Q. Just answer yes or no.



The Court: I will allow it.

A. Yes.

Q. Did you recognize the voices in that conversation?

A. Yes.

Q. Whose voices were they?

Mr. Brill: I object to it.

The Court: If you know, I will permit it.

A. Harry Steinman, Ralph Berger, and myself.

Q. Now, Mr. Jacklone, I show you Exhibit 62 for identification. Did you have that with you when you listened to that tape this morning?

A. Yes.

Q. Did you compare that transcript against the tape?

A. Yes.

Q. And is that transcript an accurate accounting of the conversation that is on that tape?

Mr. Brill: I object to it.

The Court: Overruled.

If you know, sir.

A. Yes.

Q. And the conversation that you heard on Reel 5483, is that the conversation that you participated in on the morning of June 29, 1962, in Harry Steinman's office?

[fol. 712] Mr. Brill: I object to it, if Your Honor please.

The Court: Overruled.

A. Yes.

Cross examination.

By Mr. Brill:

Q. Now, did you engage in conversation with Detective Cronin and Detective Berkowitz this morning?

A. Yes.

Q. Did you talk about what you were going to hear?

A. Yes.

Q. And were you given this document, which is now in front of you, Exhibit 62 for identification, is it?

Mr. McKenna: Yes.

Q. Sixty-two for identification.

A. Yes.

Q. And you knew at the time that that was handed to you that you would be listening to a tape where there would be voices of the persons whose names or initials are on Exhibit 62 for identification, isn't that right?

A. Yes, yes.

Q. And this was the subject of conversation among you, Detective Berkowitz, and Detective Cronin before you heard the tape this morning, isn't that so?

A. Yes.

Q. Now, the names are actually spelled out, aren't they?

A. Yes.

Q. So that you were expecting to hear what you saw on the paper when you heard it this morning, isn't that true?

A. Yes.

Q. On each of the dates that you told us about you had conversation, is that right?

A. Yes, right.

Q. Did you have a paper similar to Exhibit 62 for identification before you?

A. At one other time, yes.

[fol. 713] Q. And was it the same as Exhibit 62 that you see now?

A. Not completely, no.

Q. In other words, it was a paper that had or a document that had fewer pages?

A. Or more, yes.

Q. Or more. Fewer or more. Okay. And did you follow the tape; did you read the document that you had while you were listening to the tape?

A. Yes.

Q. And what you saw was what was being impressed on your mind as the tape was being played?

A. Somewhat, yes.

Q. And you were impressed by what you were reading, isn't that true?

A. Yes.

Q. A week or so before that. Let's see. You heard it about three weeks ago; you heard it about two weeks before that, which would be five weeks ago; and you heard it again a week before that, which would be about six weeks ago; is that right?

A. Approximately, yes, sir.

Q. Who was present on that occasion?

A. Mr. McKenna.

Q. Did you have a paper in front of you then?

A. No.

Q. And how long do you say that took?

A. Oh, about approximately an hour.

Q. Now, that is the fourth time, I think, and that is six weeks ago. Now, when before that did you last hear it?

A. I don't recall. I heard—

Q. But you do know you heard it at least a couple more times before that?

A. Yes.

Q. Right?

A. Yes.

Q. On any of the days that you heard it, was it played more than once?

A. Yes.

Q. How many times was it played on any one day?

A. Well, where it wasn't clear, I couldn't hear it, it was played five or six times.

[fol. 714] Q. And how many times did that happen?

A. Quite often.

Q. On each of the occasions that you heard it?

A. Yes.

Mr. McKenna: Your Honor, that completes my foundation for the tapes.

I have two other witnesses I would like to call in the interim, before I offer the tapes in evidence.

[fol. 716] ARNOLD J. MORTON, recalled as a witness on behalf of the People, having been previously duly sworn, resumed the witness stand and testified further as follows:

Re-direct examination.

By Mr. McKenna (Continued):

Q. Mr. Morton—

The Court: For the record: The Court has heretofore reserved decision with respect to a line of inquiry which the District Attorney had proposed to pursue at a prior stage in the trial. I am now permitting him to pursue the inquiry.

Q. Mr. Morton, do you recall that you testified before the Grand Jury in connection with this matter?

A. Yes, sir.

Q. And before you testified before the Grand Jury, did you have a conference with your attorney?

A. Yes, sir.

Mr. Brill: That is objected to and I move to strike it.  
The Court: Overruled.

Q. And did a representative from your attorney's office accompany you to the Grand Jury?

A. Yes, sir.

Q. Now, do you recall in the Grand Jury being asked these questions and giving these answers, Mr. Morton?

Question by Mr. Scotti, page 2134: "Mr. Morton, I want you to know that you have been called as a witness before this grand jury in connection with an investigation to determine whether there has been or was in existence a conspiracy to commit the crimes of bribery of a public officer. Specifically, the grand jury is conducting an investigation to determine whether certain public officials, including particularly one Martin Epstein, had conspired with others [fol. 717] to commit these crimes of bribery of a public officer, or taking of unlawful fees."

Mr. Brill: Your Honor, I don't think that we ought to have a speech by Mr. Scotti before the Grand Jury read in in connection with the asserted purpose for which this testimony is offered.

Mr. McKenna: I will skip the rest.

Mr. Brill: I move to strike it and ask Your Honor to instruct the jury to disregard it. Mr. Scotti has an excellent speech, but that is not a matter before this jury.

. . . . .

Mr. McKenna: On page 2135.

Q. "Now, I want you to know that should you invoke your privilege and subsequently be granted immunity, you will be—you will receive immunity for prosecution [should be 'from prosecution'] for whatever crimes that your testimony may disclose. However, you will not receive immunity from prosecution for the crime of perjury or for the crime of contempt. You understand that?"

"A. Yes, sir."

Mr. Brill: Your Honor, this is what I am talking about. There is no reason for this speech and all this preliminary material.

The Court: I will allow it to stand. Objection overruled. Continue.

Q. And on page 2136, at the top, Mr. Brill:

"Question: Now, what is your present position, sir?"

"Answer: I refuse to answer any questions or produce evidence of any other kind on the grounds that I may be incriminated thereby."

Do you recall being asked those questions and giving those answers?

A. Yes, sir.

[fol. 718] Q. Do you recall, further, in that Grand Jury session, at page 2197—I will start in the middle of the page with an answer just to orient your thinking. "Well, I think Mr. Berger asked—"

Mr. Brill: Your Honor, this doesn't go to the material concerning which Your Honor reserved the ruling. I can see just from a quick look at it.

The Court: May I see it, please?

(Off-the-record conference at the bench among the Court, Mr. McKenna, Mr. Goldstein, and Mr. Brill, without the hearing of the jurors and the alternate jurors.)

The Court: I will allow it. Overruled.

(The following proceedings took place at the bench in the presence of the Court, Mr. McKenna, Mr. Goldstein, and Mr. Brill, but without the hearing of the jurors and the alternate jurors.)

Mr. Brill: Your Honor, this witness was recalled, as I understand it, for the specific purpose of being permitted to testify, over my objection, to the assertion of his privilege against self-incrimination on the occasion of his appearance before the Grand Jury; and it was with respect to that matter that Your Honor had earlier in the examination of this witness reserved his decision, which he has now made, to permit the witness, over my objection, to testify to the assertion of the privilege.

Now, Mr. McKenna seeks to engage upon an inquiry unrelated to the purpose for which the witness was returned and dealing with subject-matter, which was properly a matter, if it was properly a matter for cross



examination or re-direct examination, on the long re-direct examination which was conducted by Mr. McKenna—

Mr. McKenna: It was a very short re-direct.

[fol. 719] Mr. Brill: On the re-direct and on the direct examination. It is not now, I submit, a time when, in the light of his having asserted the privilege, proper to permit him, this witness, to testify with respect to any of the matter which was referred to at page 2197 for the reasons that to permit it could only tend to inflame and prejudice the jury; the matter cannot have any probative value at this time; it amounts to a re-assertion of what was already testified to; and in the light and in the context of his testimony now with respect to the assertion of the privilege, to permit him to testify to this, I submit, effectively works a denial of a fair trial to the defendant.

Mr. McKenna: Your Honor, under section 8-a of the Code of Criminal Procedure, I can go into prior statements of the witness under oath which were inconsistent with his answers given to Mr. Brill on cross examination. That is all I intend to do in this part.

Mr. Brill: He didn't bother developing that purpose.

Mr. McKenna: I did so. I was precluded from doing this.

The Court: My recollection is that he attempted to elicit this inquiry and there was an objection made and I reserved decision. I am not limiting him. If it has any bearing on any issue, I will permit him to continue with this line of questioning.

(At this point the proceedings at the bench were concluded and the following took place with the hearing of the jurors and the alternate jurors.)

The Court: Read back the question, please.

Mr. McKenna: I will start anew, Your Honor.

[fol. 720] Q. Do you recall these questions and these answers in the Grand Jury, and in response to a certain question you made a certain answer?

"Well, I think Mr. Berger asked us for \$7,500 originally and we—

"Question: For what? For doing nothing?

"Answer: For doing nothing.

"Question: Well, I—Suppose you told him no? So what could he do? Who are you afraid of? What could he do to you?

"Answer: Berger?

"Question: Yes.

"Answer: Nothing."

Do you recall those questions and those answers?

A. Yes, sir.

Q. Were those answers that you gave in the Grand Jury true?

A. Yes, sir.

The Court: Were all these questions asked of you given under oath?

The Witness: Yes, sir.

Q. Page 2199, the middle of the page:

"Question: Are you saying that this was a gift?

"Answer: We did not give him a gift, we just felt it was worth five thousand dollars to be rid of him.

"Question: He couldn't sue you in Court?

"Answer: No.

"Question: Correct?

"Answer: That is correct.

"Question: You appreciate this whole thing is illegal, right, you know that much?

"Answer: Yes, sir.

"Question: This is a conspiracy to pay off a public officer, correct?

"Answer: That is correct."

[fol. 721] Mr. Brill: Now, if your Honor please, I am constrained to make a further objection.

Mr. McKenna: Could I finish this line of questioning?

Mr. Brill: No, I think the objection must be recorded now, because I don't think your Honor will permit him to finish any more—

The Court: Come up.

(Whereupon, the following proceedings were had at the Bench, out of hearing of the jurors and the witness):

Mr. Brill: By this line of inquiry, your Honor, Mr. McKenna seeks to impeach his own witness. This witness has already testified that he did not in response to your Honor's question enter into a conspiracy to bribe a public officer, as charged in the second count of this indictment.

To read the Grand Jury testimony, which contains the substance of the answer which Mr. Scotti sought to elicit, and merely bears the concurrence of the witness, is, in effect, to have this witness now contradict himself and be impeached by this statement which Mr. McKenna urges is a prior inconsistent statement, which goes to the heart of the matter.

I respectfully submit, your Honor, that this alone generates a reasonable doubt on the basis of which your Honor would be compelled to dismiss this count of the indictment on this question.

The Court: Do you want to be heard?

Mr. McKenna: To permit me to do this without laying the foundation that he is a hostile witness—

Mr. Brill: How can you say he is a hostile witness?

Mr. McKenna: I say that 8-A allows this—

[fol. 722] The Court: The objection is overruled.

Proceed.

(Proceedings were then resumed in open Court, as follows):

By Mr. McKenna:

Q. Continuing on page 2199, and I will start with that last question again:

“Question: This is a conspiracy to pay off a public officer, correct?

"Answer: That is correct.

"Question: You could hardly ask for payment for services in connection with a conspiracy to pay off a public officer, you know that much, it is against public policy?

"Answer: Completely right.

"Question: And it would involve a disclosure of fact that would lay the basis for prosecution of all of you, you included; so what were you afraid of, why did you feel the compulsion to pay this money?

"Answer: We just paid him off to get rid of him. He asked us for seventy-five hundred, we gave him five thousand dollars."

Do you recall those questions being asked of you and you giving those answers?

A. Yes, sir.

Q. Were those answers you gave in the Grand Jury true answers?

A. Yes, sir.

• • • • •  
Cross examination.

By Mr. Brill:

• • • • •  
Q. Now, Mr. McKenna wanted to know if you asserted your privilege against self-incrimination when you appeared before the Fourth December, 1962 Grand Jury, on March the 4th, 1963; right?

A. That is correct.

[fol. 723] Q. Now, as a matter of fact, you had already made several visits to the District Attorney's Office prior to that date, hadn't you?

A. I believe I was before the District Attorney, I believe, one time before I went into the Grand Jury.

Q. At least once?

A. Yes, sir.

Q. And that was the time when you were there with Mr. Scotti and Mr. Goldstein, and some other persons, is that right?

A. I believe Mr. McKenna.

Q. And you knew at that time that you were going to be a witness before the Grand Jury, didn't you?

A. Well, I am not sure if at that meeting—

Q. What?

A. I really am not sure, I believe I did.

Q. Well, you knew when you went before the Grand Jury that you were not going to be made a defendant in in this or any other case, isn't that true?

A. That is true.

Q. So all this hocus pocus about—

Mr. McKenna: I object to that.

The Court: Sustained, strike it out, I will instruct the jury to disregard it.

Q. All the remarks that Mr. Scotti gave you was just so much window dressing, because you already knew about it; isn't that true?

Mr. McKenna: Objection.

The Court: Reframe your question, objection sustained as to the form of the question.

Mr. Brill: All right.

Q. So that you knew before you went in the Grand Jury that you were not going to be prosecuted, isn't that true?

A. That is correct.

Q. And there was no need, so far as you were concerned, for having had any such speech as Mr. McKenna read to you as coming from Mr. Scotti, when you appeared before the Grand Jury; isn't that so?

[fol. 724] Mr. McKenna: Objection, your Honor.

The Court: Objection sustained.

Q. Did the statements which Mr. McKenna read to you from the pages of the Grand Jury testimony today make

any difference in your mind at the time that you went before the Grand Jury and testified?

Mr. McKenna: I object.

The Court: Sustained.

Mr. Brill: I will go to something else.

Q. Do you recall in this trial that you were asked a question by the Court, at page 426, as follows:

"The Court: In substance counsel is asking you whether you, together with anyone else, conspired, that is, entered into any agreement with a corrupt motive to violate Section 378 of the Penal Law, the Section which relates to offering, or giving, a bribe to a public official in order to influence him in any act, decision, or opinion that he is empowered to make, in this case, Commissioner Epstein?"

Then there was an objection by Mr. McKenna.

"The Court: He may be able to answer it. I will allow him to answer it. Did you do that, sir?"

"The Witness: No, sir."

Do you remember that question and that answer?

A. Yes, sir.

Q. And at the time that you made the answer did you tell the Court the truth?

A. Yes, sir.

Q. Do you remember testifying, in substance, that after you discharged, or got rid of, or paid off, Ralph Berger, you had conversations with Judson Morhouse, and [fol. 725] that as a result of those conversations you and Messrs. Hefner, Lownes and Preuss were concerned and afraid; do you remember in substance your testimony with respect to that?

A. We were concerned and afraid about our license; is that what you are saying?



Q. Well, did you understand my question?

A. Well, what is it—was that the entire testimony.

Q. No, did you understand my question, if you didn't, please say so?

A. I would appreciate it if you would please read it again.

Q. All right, I did not read it, I framed a question, or phrased a question, based upon several questions that had been testified to, but I will read you the questions and answers. At page 391, this is your testimony:

"Now, were you, Mr. Hefner, and Mr. Lownes, and Mr. Preuss, after your first meeting with Mr. Morhouse, afraid that you would not get your license unless you paid off as demanded?

"Answer: Yes, sir."

Do you remember that question and that answer?

A. Yes, sir.

Q. And was that answer true at the time that you made it?

A. Yes, sir.

Q. In this trial?

A. Yes, sir.

Q. The next question:

"Were you afraid and were you aware that Mr. Hefner, Mr. Lownes and Mr. Preuss, as well as yourself, were also afraid that the Liquor Commissioner had the right—I withdraw that—that the Liquor Commissioner had the power to deny you your legal right to the license; do you understand that, sir?

"Answer: I am not sure that I understand that, sir.

"Question: Were you and Mr. Lownes and Mr. Hefner and Mr. Preuss afraid that the Liquor Commissioner had the power to deny you the license?

[fol. 726] "Answer: Yes, sir."

Do you remember making those answers to those questions?

A. Yes, sir.

Q. And at the time that you made them were the answers true?

A. Yes, sir.

Q. "Question: Then did you testify in answer to this question—" Just a moment.

"Were you and Mr. Lownes and Mr. Hefner and Mr. Preuss afraid that you would have such—afraid that you would suffer a great economic loss in such event?

"Answer: Yes, sir."

Do you remember that answer to that question?

A. Yes, sir.

Q. And you made that answer?

A. That is correct.

Q. And at the time you made it it was true?

A. Yes, sir.

Q. Now, do you recall these answers and these questions—

"Question: And were you and Mr. Lownes and Mr. Hefner and Mr. Preuss afraid that unless you paid off as demanded you would have serious problems?

"Answer: Yes, sir.

"Question: Also in connection with the collection through the mails of a million and a half dollars, that was a matter that was bothering you at that time?

"Answer: Yes, sir.

"Question: And an additional reason for the urgency?

"Answer: Yes, sir, we had an obligation to people we took money from."

Do you remember making those answers to those questions?

A. Yes, sir.

Q. And at the time you made them those answers were true, weren't they?

A. That is correct.

[fol. 727] Q. Do you remember being asked this question—we are now down towards the bottom of page 392, Mr. McKenna—

“Now, as a matter of fact, weren’t you and Mr. Lownes and Mr. Hefner and Mr. Preuss afraid that unless you paid off what was demanded in accordance with that conversation, or those conversations, you had with Mr. Morhouse, that you would lose the investment in the club?

“Answer: It was a concern, yes, sir.”

Do you remember making that answer to that question?

A. Yes, sir.

Q. And do you remember this question and this answer:

“No, no, answer my question, please. Isn’t it true that you were afraid that unless you paid off as you were told by Mr. Morhouse you would lose your investment in the New York Club?

“Answer: Yes, sir.”

Did you not make that answer to that question?

A. Yes, sir.

Q. In this trial?

A. Yes, sir.

Q. And at the time you made it was the answer true?

A. Yes, sir.

Q. Now, with reference to other matters you were asked this question at the top of page 394:

“All right, now, isn’t it true that you and Mr. Hefner and Mr. Lownes agreed that you would pay because of those fears?

“Answer: Yes, sir.”

Do you remember that question and that answer?

A. Yes, sir.

Q. And the answer at the time you made it in this trial was true, isn’t that so?

A. Yes, sir.

[fol. 728] Q. And do you remember being asked this question, at page 395, and making this answer:

"All right, now, didn't you and Mr. Lownes and Mr. Hefner and Mr. Preuss all agree among yourselves that you felt, each of you felt, that you were pressured to pay the Liquor Commissioner and to Mr. Big, after these meetings with Mr. Morhouse?"

"Answer: Yes, sir."

Did you make that answer to that question?

A. Yes, sir.

Q. And at the time you made the answer was it true?

A. Yes, sir.

Q. Now, Mr. Morton, do you remember being asked this question with respect to the matter and making this answer, at page 417:

"And did you also say that you absolutely felt that it was a shake? What is the answer, please?"

"Answer: Yes, sir, I am not sure of the exact terms."

Do you remember making that answer to that question, in this trial?

A. I don't remember that phrase, but if it is down there I obviously said it, yes, sir.

Q. Well, isn't that in fact what you and Mr. Hefner and Mr. Lownes and Mr. Preuss all agreed among yourselves that it was? Isn't that true?

A. To a point, yes, sir.

Q. Yes. Now do you remember being asked this question and making this answer: "Now isn't it true, then, Mr. Morton, that you and Mr. Lownes and Mr. Hefner and Mr. Preuss felt that you were trapped as a result of your conversations with Mr. Morhouse? What's the answer? You can't nod your head affirmatively. You must speak it up."

[fol. 729] "The Witness: I thought the gentleman was going to make a statement."

"Mr. Brill: Never mind Mr. McKenna. You answer the question.

"The Witness: Would you please read that question?"

"The Court: We'll have the reporter read it back.

"(Whereupon, the last question was read back by the Court Reporter, as follows: 'Now isn't it true, then, Mr. Morton, that you and Mr. Lownes and Mr. Hefner and Mr. Preuss felt that you were trapped as a result of your conversations with Mr. Morhouse?'

"Answer: Yes, sir, that's correct.'")

Do you remember making that answer to that question?

A. Yes, sir.

Q. And at the time that you made that answer, was it true?

A. Yes, sir.

Q. Now do you remember being asked this question and making this answer—

Mr. McKenna: Page?

Mr. Brill: 420, next to the last.

Q. (Continuing) "Question: Did you and Mr. Hefner and Mr. Lownes and Mr. Preuss, among yourselves, agree that you were the victims of corruption?"

"Answer: Yes.

"Question: And didn't you all say so to one another?"

"Answer: I'd say, yes, sir."

Did you make those answers to those questions?

A. Yes, sir.

Q. And at the time you made them were the answers true?

A. Yes, sir.

[fol. 730]      Redirect examination.

By Mr. McKenna:

Q: Did anyone ever threaten you—

Mr. Brill: That is objected to.

The Court: Overruled.

Q. —that unless you paid off, you would not get your liquor license?

Mr. Brill: That is objected to.

The Court: Overruled.

A. No, sir.

Q. Is it not true that your definition of bribery does not include paying off to get something you feel you're entitled to?

Mr. Brill: I object to it.

Mr. Brill: That is not the definition of bribery as a matter of law, your Honor.

The Court: That's all been opened by you on your cross examination.

Mr. Brill: Not with respect to what is the definition of bribery, your Honor.

The Court: Well, I think we're getting very confused with this at this point.

I'll sustain that objection.

The Court: Reframe your question.



[fol. 731] By Mr. McKenna:

Q. What do you understand by the word "bribery"?

Mr. Brill: I object to it.

The Court: (To the witness) You may answer it.

A. My definition of bribery is to pay for something that you're not entitled to.

Q. And you felt you were entitled to this license; is that right?

A. Yes, sir.

HYMAN AMSEL, residing at 570 Grand Street, New York, N. Y., called as a witness in behalf of the People, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct examination.

By Mr. McKenna:

Q. Mr. Amsel, were you counsel to the New York State Liquor Authority while Martin C. Epstein, was Chairman of the New York State Liquor Authority?

A. Yes.

The Court: The Court does take judicial notice of the pertinent provisions of the Alcohol Beverage Control Law, particularly Section 17.

The Court: Which defines the powers of the Authority.

Q. Mr. Amsel, are you familiar with the facts that led to the granting of a liquor license to the Playboy Club?

A. No, other than is contained in the file, I had no knowledge of it.

[fol. 732] Q. Was there an opinion given by counsel to the Chairman of the New York State Liquor Authority as to the legality of the method of operation of the Playboy Club?

Mr. Brill: That is objected to, if your Honor please.

The Witness: By me?

Mr. McKenna: No, by the counsel office.

The Court: Just answer yes or no, if you know.

A. As far as I know, no. As far as I know.

Q. Did the counsel's office of the New York State Liquor Authority formulate an opinion with regard to the legality of the method of operation of the Playboy Club?

Mr. Brill: I object to it.

The Court: (To the witness) If you know, sir, you may answer it.

The Witness: At what point?

Mr. McKenna: Say in 1961.

A. Well, not particularly as to the operation of the Playboy Club.

Mr. McKenna: All right.

A. (Continuing) As to a general operation of it.

Mr. Brill: I object to that, and move to strike it out, as to a general operation.

The Court: I'll allow it. Overruled.

Q. Was an opinion formulated in the counsel's office of the New York State Liquor Authority concerning the legality of requiring keys for the admission to a premises selling liquor?

[fol. 733] Mr. Brill: That is objected to.

Q. (Continuing) Under a restaurant liquor license.

Mr. Brill: That is objected to.

The Court: Overruled.

(To the witness) You may answer it, if you know.

Mr. McKenna: 1961.

Mr. McKenna: Or previous to it.

Mr. Brill: I object to this, if your Honor please.

The Court: Sustained.

Q. Will you please explain the opinion formulated by the counsel's office as to the legality of the key operation under a restaurant liquor license.

Mr. Brill: That's objected to. He can do it in his private office, not in this courtroom, under the rules of law.

The Court: I will allow it.

The Court: \* \* \* (To the witness) You may answer, if you know.

A. In 1960 the Authority ruled that where a key was used to obtain admission to a restaurant, it was contrary to the provisions of the ABC Law.

Mr. Brill: I move to strike it out because it's not responsive.

Mr. McKenna: I think it is.

[fol. 734] The Court: I believe it is, too. I'll allow it to stand.

The Court: (To the witness) Was it the counsel's opinion or was it the Authority's opinion?

The Witness: If I can explain—

The Court: You may.

The Witness: Your Honor, in so many words, counsel didn't render an opinion to the Authority on this point.

What happened is this: In a specific instance, a specific case, the Authority ruled that admission to a restaurant by means of a key to gain access was contrary to the provisions of the ABC Law and cancelled the license because of that. The licensee, in early '60, went to court—

Mr. Brill: Excuse me. I object to it and move to strike it.

The Court: Just the latter part.

Mr. Brill: All of it as having no relationship to this case.

The Court: I'll allow the first part to stand.

Mr. Brill: He's talking about some other case.

• • • • •  
By Mr. McKenna:

Q. And as far as the New York State Liquor Authority was concerned, did this form of precedent, with regard to the other key type of operations—

Mr. Brill: That is objected to, and obviously this witness is not competent to testify to any such matter.

The Court: (To the witness) Do you know, sir?

I'll allow the answer.

[fol. 735] A. At no time—I'll answer, your Honor, if it's answerable, I'm doing—I'm trying to answer the question as best I can. It was always the opinion and policy of the Authority and counsel's office didn't disagree with it, to my knowledge or to the knowledge—

Mr. Brill: I object and move to strike it.

The Court: I'll allow it.

A. (Continuing) Or any information that I could obtain that admission to a restaurant must be to the general public, and any means or method of gaining admission by means of a key or a one-time admission fee was contrary to the law.

Mr. McKenna: That's all.

Mr. Brill: I object to it and move to strike it.

The Court: Your objection is overruled, and your motion is denied.

Cross examination.

By Mr. Brill:

Q. Was this opinion ever reduced to writing?

The Witness: On the key, you're talking about, Counselor?

Mr. Brill: Yes, sir.

A. Was never reduced to writing, I'll say that.

Q. This was just something that was passed around by word of mouth; is that right?

A. Well, it was—I wouldn't say "word of mouth." This is an agency. We—

Q. There was nothing in writing about this opinion, was there?

The Witness: Admission by a key, now, you're talking about?

Mr. Brill: That's right. That's what we're talking about.

[fol. 736] A. Except in the Burton Brown case, and that was in the early part of 1960.

Mr. Brill: Excuse me?

A. (Continuing) Where it was delivered. That was a ruling.

Mr. Brill: I move to strike what he says about the Burton Brown case as having no relevancy or bearing to this case.

The Court: I'll strike it out.

Q. Right. And as a matter of fact, the courts of this State sustained the right of the Playboy Club to have a key operation such as it has. Isn't that right?

A. The Appellate Division and the Court of Appeals ruled contrary to the contentions of the Authority.

. . . . .

DAVID F. CAMPBELL, Police Officer; Shield No. 41, Police Department, City of New York, attached to the District Attorney's Office Squad, New York County, called as a witness on behalf of the People, being first duly sworn, testified as follows:

(The following proceedings took place at the bench in the presence of the Court, Mr. McKenna, Mr. Goldstein, and Mr. Brill, but without the hearing of the jurors and the alternate jurors.)

Mr. Brill: May we for the record, Your Honor, have the record show that I have interposed what we call in this case a general objection and now Your Honor has ruled as [fol. 737] heretofore with respect to all the witnesses and I have an exception.

Thank you.

(At this point the proceedings at the bench were concluded and the following took place within the hearing of the jurors and the alternate jurors.)

Direct examination.

By Mr. McKenna:

. . . . .

Q. Detective Campbell, I direct your attention to June 29, 1962. Did you receive an assignment from your commanding officer on that date?

A. Yes, sir, I did.

. . . . .

Q. What did you do?

A. I had placed under observation the premises of 15 East 48th Street?

Q. Did you observe Ralph Berger on that date?



A. Yes, I did.

Q. Now, will you please tell us what you observed relative to Mr. Berger on June 29, 1962.

A. At approximately 11:40, 11:45 A. M., on that date, I had observed Mr. Ralph Berger, in the company of Mr. Harry Steinman, leave the said premises.

Q. What premises?

A. 15 East 48th Street. I had put them under observation and tailed them at a discreet distance to a location of 45 West 54th Street. I believe it was the office of Dr. Samuel Cohen. Both Mr. Berger and Mr. Steinman remained at that address for approximately 25 to 20, to 30 minutes, at which time they left and returned to the office of Harry Steinman.

Q. Did you observe them leave from that premises again that day?

A. At approximately I would say 2:10, 2:15 P. M., Mr. [fol. 738] Berger emerged from the premises and entered a cab. I was not in a position to tail.

Q. Mr. Campbell or Detective Campbell, was Reel 5483 re-recorded in your presence on December 26, 1962?

A. If the record so indicates, Mr. McKenna, I know that to the best of my knowledge I did sign out a reel from Mr. Mahoney.

Q. Did you return Reel 5483 to Mr. Mahoney on December 26, 1962?

A. Yes, sir, if the records so indicate.

Mr. Brill: I have no questions.

October 29, 1964.

(At this point the proceedings at the bench were concluded.)

The Court: You may proceed, Mr. McKenna.

Are you ready to proceed, Mr. McKenna?

Mr. McKenna: Yes, Your Honor.

The Court: I have been waiting for you to proceed.

Mr. McKenna: Oh, I am sorry.

Your Honor, at this point the People offer in evidence tape recording 5483, which is the People's Exhibit 61 for identification.

Also, if that is admitted into evidence and the People are allowed to play the recording for the jury, we would request that People's Exhibits 62 and 63 also be submitted [fol. 739] to the jury only for the limited purpose of following the recording that is contained in Exhibit 61. We are not offering 62 and—sixty-one—

A. I am sorry. The reel itself is 61-A.

The Court: The reel itself is what?

Mr. McKenna: 61-A. The box is 61.

The Court: Oh.

Mr. McKenna: We are just offering the transcripts contained in Exhibits 62 and 63 for the limited purpose of being better able to follow the recording which we would like to play for the jury.

We have the precedent of the *Feld* case, where the Court of Appeals regarded these transcripts as aids to the jury to follow the evidence and regarded them in the nature of a photograph of the scene of a crime, which the jury could view while actually listening to the testimony.

So at this point, Your Honor, we offer in evidence Exhibits 61, 62, and 63.

The Court: I will hear counsel.

Mr. Brill: With Your Honor's permission, I will take advantage of the kind offer to address myself on my objection on the tape.

I also object to the reception of Exhibits 61 and 61-A on the grounds which I shall more specifically set forth in a moment.

I also object to making available to the jury the copies of the transcripts heretofore marked Exhibits 62 for identification and 63 for identification, and in the course of this argument will advert to the grounds upon which those objections are based.

Addressing myself first to the question of audibility of the tape which is contained on Exhibit 61-A for identification, [fol. 740] Your Honor will recall that on the 15th of October, in the absence of the jury, with the public excluded, by consent of all parties, a dry-run was had with respect to the tape and its contents for the purpose of determining whether or not it satisfied the requirements of law in respect to audibility.

Limiting myself to this particular Reel No. 5483, inasmuch as Your Honor has already excluded the other tapes for the reasons set forth by Your Honor in the ruling made at the end of the second dry-run on October 22, or 20th—I beg Your Honor's pardon—October 20, 1964, at which time the dry-run was had again in the absence of the jury, with the public excluded with the consent of all parties, except that on the application of the District Attorney Your Honor permitted the tapes to be heard with earphones.

On both occasions on which the dry-runs were had, the court reporters, Messrs. Mickell, Mershon, and Shaw, were present and performed their official duties as court reporters, and on each occasion each made stenographic notes of what he heard; and I can say to Your Honor now that I have been furnished with the transcripts made by Mr. Mickell of the proceedings had on the 15th and the 20th days of October, and the transcripts made by Mr. Mershon of the proceedings had on the 15th and 20th days of October, but I have not yet been furnished with the transcripts made by Mr. Shaw.

On the occasion when Reel 5483 and the tape thereon was played in this courtroom on October 15, I personally observed that the operator of the machine made not less than eight corrections by manipulation of the control dials.

[fol. 741] I pointed out following the running of the tape that it was evident that there were inaudible, unintelligible, indistinct, garbled, and blank portions.

Although I don't think that I said so at the time to Your Honor, it seemed to me that there were also what appeared to be breaks in the tape and there were extraneous noises.

I pointed out to Your Honor at that time, I believe, and, if I haven't, I intend to do so now, that there was no proof and since then there has been no proof as to what was the matter recorded on the tape, regardless of the nature, whether it be exculpatory or not, in respect of the blank spaces on that tape.

Incidentally, I should like at this time to point out that with respect to the alleged conversations had on June 28, 1962, alleged to be recorded on the tape on Reel No. 5483, that there was a gap in which there was not less than five minutes of silence; and I believe that I pointed that out to Your Honor at least on the second dry-run, if not on the first—yes, it was on October 20, 1964.

And since that time there has been no proof offered that there was anything that was—no proof offered to establish that nothing was said during those five minutes which was not in context with, or exculpatory with respect to the rest of the matter in the tape.

A reference to the transcripts had or made by the Official Court Reporters with respect to that date will show that the tape made by—I am sorry, your Honor will have to bear with me a little bit, I must say I am, frankly, tired out—the tape made by Mr. Merston with respect to the [fol. 742] alleged conversations of June the 28th, 1962, is reflected by his transcript containing five pages in which he has indicated, as demonstrated by his transcript, by dots that there was matter which was omitted because it could not be heard by the Court Reporter. There were fifty such omissions contained in those five pages.

With respect to the transcription of the proceedings had with respect to that tape, and the report of Mr. Mickell concerning the alleged conversation of June 28th, 1962, the

transcription consisted of five pages in which there were ninety-eight gaps, evidencing that there was matter which was inaudible, indistinct, incomprehensible and otherwise not heard by the Court Reporter. This is a matter of simple arithmetic computation.

Mr. Mershon's transcription of the tape heard on October the 20th with respect to the alleged transactions of June 29th, 1962, contained five pages and he indicates by the symbol used in his transcript that there are at least fifty-four gaps, evidencing matter which was inaudible, incomprehensible, or not heard by the Court Reporter.

Mr. Mickell, with respect to the same tape, and for the same day, made a transcript which is contained in six pages, and in which he indicates there are by my count one hundred and twenty-one blank spaces, demonstrating inaudibility, or otherwise matter which was not heard.

Now, without even the benefit of the transcription made by Mr. Shaw, it is quite obvious that we now have a circumstance which places all parties in a very serious predicament. Which of the three sets of transcripts will become the Official Transcript of this trial?

[fol. 743] Certainly the defendant should not be put to the responsibility of making a selection, and certainly with such disparity in the transcript prepared by the Official Court Reporters of this Court, there can be no question but that the tapes, or tape, rather, on the two days which is offered for the transactions of the two days in question, is entirely untrustworthy, not only because of the blanks, but because of the failure to prove that there is not contained in the blanks matter which would be exculpatory, or would modify that matter which was in part inaudible to the Court Reporters.

I must say my own reaction to listening to the tapes on both days was that there was a lot of gibberish, gobbledygook, and even Donald Duck, to the extent of giving me pains in the head from having to listen with the earphones on. There was not a clear, comprehensible, intelligible continuity, audible to the hearer, as is evidenced not only by my own



response to it, but also by what the Court Reporters officially set forth.

Now, it seems to me—if your Honor will bear with me just a moment—that before Your Honor could admit a tape in which it is alleged conversations are recorded, your Honor must be satisfied that all of the conversations was both audible and intelligible, and where we have a circumstance such as this whereby the Official Reporters transcript in both instances demonstrates that they could not understand what was being played back on the tape, that there must be left to the jury—if it is given the opportunity to hear this—the right, if Your Honor pleases, to speculate and to conjecture as to what is being said on the tape. •

[fol. 744] Certainly any such course of action is repugnant to what we understand to be the principles of law governing a jury trial in a criminal case. No jury should ever be permitted to speculate or to conjecture. It should only be permitted to deliberate upon evidence adduced pursuant to the rules of law in the courtroom in the course of the trial.

I respectfully submit to your Honor that in the circumstances with respect to this tape, without even touching upon other matters which I shall discuss as I pass on to those elements—the matter of audibility, alone, where we have incompetent segments, as well as all of the other items to which I have already alluded, that your Honor need not even go further, but would be obliged to say that the tape would be excluded.

Now, if your Honor will permit me, I should like to go to the question of the authenticity. Within the last two days there has been an effort made on the part of the People to establish identification of voices, the voices which it is alleged are heard on the tape which is on Exhibit 61-A for identification.

Without burdening the Court, I should like to make reference to the testimony of some two or three of those witnesses. For example, the witness Bernhard was produced



to establish that two years and four months after he said he heard a conversation—I beg your Honor's pardon—a fragment of the conversation.

The Court: Now, I must interrupt at this point because you will recall that the Court reserved decision on your motion to preclude him—

Mr. Brill: Yes, sir.

[fol. 745] The Court: From relating what he purportedly overheard.

Mr. Brill: Two years and four months later.

The Court: That is correct.

Mr. Brill: Yes, sir.

The Court: And you have not called my attention to the fact that I have not ruled on your motion. Isn't that a fair statement?

Mr. Brill: I haven't called it to your Honor's attention—it is a fair statement—because my experience in this trial with Your Honor has been that Your Honor has kept notes of the matters which are open, and Your Honor has disposed of them without exception, without need of—

The Court: With the one exception to which I have presently alluded.

Mr. Brill: Except as to this matter, without the need of reminders from either the District Attorney or myself.

The Court: Well, I quite agree with counsel for the defense that what he purportedly overheard in Kenny's Steak Pub on the evening of June 25th, 1962 was of a most fragmentary nature, and he seeks to bolster his contention that he can make these voice identifications by virtue of what he heard in October of 1964, some two years and four months or five months subsequent to the event. I sustain the objection made by counsel and will preclude the jury from taking into consideration any testimony given by him with respect to any voice identification.

Mr. Brill: All right.

Now, with respect to the Witness Cronin, whose testimony, as I recall it, your Honor, in substance is that on June the 29th he heard voices transmitted from the private office by reason of a concealed bug in Harry Steinman's—

[fol. 746] The Court: He is the big detective?

Mr. Brill: With the black hair—

• • • • •

Mr. Brill: Well, his testimony, in substance, is that six months after he heard the tape, as it was being made, he had a conversation in Chicago on December the 10th with Mr. Berger and he further goes on to say that nearly two years later, on at least two occasions on successive dates before he was recalled to testify yesterday, he was obliged to listen to the tapes so that he could positively identify the voices and on the basis of that remote relationship, first, months prior to having ever heard the voice, and thereafter nearly two years following having heard the voices, he claims he can now positively identify the voice as being that of the defendant Ralph Berger.

• • • • •

I don't think I have to point out the rule of law to your Honor, because your Honor has already indicated, by excluding the testimony of the witness Bernhart with respect to that matter, that such periods of time are regarded as being too remote to warrant giving credence to the authenticity of such identification.

In these circumstances, I respectfully urge that Detective Cronin's testimony is not of probative value. Bearing in mind, your Honor, that yesterday morning, in the presence of other persons, both of whom were called as witnesses yesterday, he heard the tape, and although there is some discrepancy between himself and the witness Jacklone as to what was said, I need not go into that, but the fact is that there was conversation, and the conversation was about the identification of the voices, and this occurred, [fol. 747] and it was necessary to so implement Detective Cronin's testimony, after he had heard, as he said, the tape only the day before yesterday.

So that to suggest, here again, that a jury should be permitted to speculate upon any such testimony is to do violence to a fundamental principle of law.

Now I don't think I need to say too much about the witness, Detective Reilly, who concededly, nearly two—I withdraw that—two years and four months ago heard a voice but none of the language used by that voice, none of the words employed by that voice, and who now has, and I say advisedly, the temerity to suggest that without having heard the conversation, he is now able to testify, having replayed this tape on many days and countless number of times, that the voice which he heard, without hearing that voice say anything intelligible to him, which he could overhear, is the voice of the defendant Ralph Berger.

And, finally, I'd like to make a passing comment upon the testimony given by the confessed perjurer, Frank Jacklone.

Mr. McKenna: I object to the use of that, your Honor.

Mr. Brill: He is a confessed perjurer. The record so shows it.

The Court: The statement is presently being made in the absence of the jury. That's his characterization of it.

The jury and the jury alone has the obligation of evaluating his credibility.

I find nothing prejudicial to the People by allowing it to stand in the record.

You may continue.

[fol. 748] Mr. Brill: I will show, for the record, that he admitted swearing falsely, and this, in my view, is the statement of a confessed perjurer.

The Court: You may continue.

Mr. Brill: Thank you.

Now, Mr. Jacklone was returned to the District Attorney's office, where apparently he had established some pleasant social relationships—

Mr. McKenna: Your Honor, do we have to go over that again?

Mr. Brill: At least half a dozen times—

The Court: Mr. McKenna, I would prefer to let him continue without interruption, particularly where the state-

ment presently being made is in the absence of the jury and it cannot possibly be prejudicial to the People.

Mr. Brill: At least a half a dozen times, by his own admission, on each of which occasions there was played for him this self-same tape, and I ask your Honor to note that this is a tape in which he, Frank Jacklone, allegedly is one of the participants in the conversations on both dates, when it is alleged that the tape was made. Yet it was necessary for Mr. Jacklone to be given the opportunity, on at least half a dozen occasions, to listen to his own voice and to the voices of others which were recorded, as I said earlier, not completely and with considerable inaudibility, and to replay on several of those at least six occasions several times the same tape in order to enable him to reach a conclusion, which apparently he had not reached until yesterday morning, when he had the benefit of seeing what he was listening to at the time when it was played for him, in the presence of Detective Cronin and Detective Berkowitz.

[fol. 749] To suggest that his testimony can support the authenticity of the tape in regard to the voices recorded and the statements made is to make a mockery of a courtroom and a trial where justice should prevail.

No, thirdly, and I think I have, in passing, made some comment with respect to this already, under the element of audibility—the accuracy of the tape is most highly questionable. Certainly, the tape can't be cross examined, and to permit it, having been made as it was, and unidentified as it is, with the omissions and gaps that run not for ten seconds or less, but at least in one instance for as long as five minutes, would be to permit a matter which is again purely speculative, without corroborative value. Certainly, it can't be said to be corroborative inasmuch as it is incomplete, even to the extent of the limited portions for which the district attorney seeks to offer segments of it without proof of what the balance of the tape shows in respect to those proffered segments.

I don't think I need to say too much about the chain of possession of Exhibits 61 and 61-A for identification. Your

Honor's notes must be very clear, and the ink is probably still fresh, since they were made only some time late yesterday. But I am constrained to make some reference to the purported transcripts identified now in this record as Exhibits 62 and 63 for identification.

If ever there was an example of chop suey, it is certainly manifested by these transcripts, which admittedly were the result of the preparation of several prior transcripts, which were dissimilar in many respects, as the proof showed in the cross examination of the witnesses called to identify those transcripts, which consisted of impressions, auditory im-[fol. 750] pressions, coupled with visual impressions of these revised transcripts, and finally emerged as the completed work of art of perhaps four, if not five, members of the prosecution's staff.

Your Honor will recall the testimony of the witness Jacklone, who admitted quite freely, and I don't want to give the impression that I will vouch for his credibility as a witness, but he admitted quite freely that he read the names of the purported voices on the tape yesterday morning, and this aided him in making the determination as to who was saying what at the time, and he purportedly is one of the participants in the self-same conversation concerning which he is now trying to give support to this purported transcript.

My recollection is that it was the transcript of the 29th—I have forgotten the date, and I am at a slight handicap, but that's easily referable and we can find it without too much trouble.

The Court: The morning of the 29th is right.

Mr. Brill: Yes, sir. Thank you.

Mr. McKenna: Just to clarify one other point: His voice is not on the first tape, the first conversation.

(To Mr. Brill) You made reference to that.

Mr. Brill: On the 28th.

Mr. McKenna: He's not on any conversation on the 28th.

Mr. Brill: All right, I accept the suggestion and to the extent that I made a reference to his voice being on the tape on the 28th, I withdraw the remark or the comment.



I must say that, having listened as carefully as I did and reviewed the transcript of this trial, to the extent that I was able, coupled with the examination of the notes which I made, both in the courtroom and on each of the occasions [fol. 751] of the dry runs, I was left confused, and I have no doubt but that there must be others who heard it who must be equally if not as much or more confused.

Your Honor must acknowledge that I have had a considerable amount of professional training and experience, and if I am met with this kind of difficulty, not merely as an advocate but as one listening to what purportedly is being said, then certainly untrained members of a jury, who come from a cross-section of American life in this great City of ours, cannot be expected to listen to this tape without having impressed upon their minds this stew now characterized as Exhibits 62 and 63 for identification.

I submit to your Honor that to permit the jury to read Exhibits 62 and 63 for identification, assuming *arguendo* that your Honor will permit the tape to be heard by the jury, would constitute such irremediable prejudice to the defendant that in effect your Honor would be denying him a fair trial, and I respectfully submit that neither the tape, nor the purported transcripts attain the dignity of evidence and they should be excluded by your Honor. And I press my objection.

The Court: I'll hear the People.

Mr. McKenna: A few preliminary remarks, your Honor: You've heard the tapes. They contain natural conversations between the participants. They are not conversations or statements made with the solemnity and slowness that a witness would make a statement in the courtroom. There are natural interruptions where one speaker interrupts another. In fact, in some of the conversations two people are talking while a third is on the telephone, and it would be [fol. 752] impossible to demand of the stenographers, on one sitting and on just one run-through, that they record everything that's on that tape, and I think I made that clear to your Honor when I first offered the tape.



Secondly, I notice Mr. Mershon is here. I hope you will forgive me. He informed me on one of the evenings that the tape was being played that he had an infection of the inner ear. So his audibility, I would say, is slightly impaired. But be that as it may.

As for the correction of the control dials, your Honor, I think we're not limited to making one setting on the controls and then stand away from the machine. Where the voices of the participants drop, the People should be allowed to amplify the sound, and it doesn't change the conversation whatsoever.

As for the identification of the voices, Mr. Brill has conveniently omitted Detective Cronin's identification of the tape, of the voices on the tape, as soon as he returned from Chicago, and again within a month, in January of 1963, listening to that tape again, and again identifying the voices.

And as for Detective Bernhart, if you will recall his testimony, he went to the plant on June the 29th and listened to the tape and identified the voices at that time. So there was a prior identification by Detective Bernhart.

As for Mr. Jacklone, he was asked to listen to the tape, to testify to the authenticity of the transcript. This was a participant in the conversation, and he was asked whether wherever on the transcript a voice was identified as belonging to Harry Steinman and Ralph Berger, was that a correct identification of the speaker, and he said, "Yes." So that was our purpose in having him read the transcript [fol. 753] and listen to the tape, and he has done the most conversing with Steinman and Berger.

And, your Honor, as far as impressions are concerned, I think it's quite obvious that the word "impression" was a word forced upon the witness by Mr. Brill. They would testify that they heard that, and then he would come back to them with, "Was that your impression?" And they adopted his language in their answers.

I think the Court is quite aware of the fact that they were not testifying as to their impressions but as to what they actually heard.

Now as to the audibility of the tapes, your Honor, you've heard them, and we submit that the tapes, substantial portions of that tape are audible. There are inaudibilities, conceded, but they are no more than a few words at certain sections of the tape. There is inaudibility due to the fact that the participants of the conversation are speaking at the same time, so that the microphone picks up both, and as a result you are unable to distinguish what each is saying.

But throughout all the tapes, Your Honor, the thread of intelligibility runs. The five-minute pause that Mr. Brill is referring to is a pause between conversations on the 28th. It is not a pause in the middle of the conversation. And we were running the tape just to get to the next portion. Wherever there were pauses, we timed them. Also during the pause, from the background noise, I believe you are able to determine that the microphone is recording the sounds that are coming from that room. The speakers may not actually be speaking, but from the sound that is coming over it is quite obvious that the microphone is working; and that if there were any conversation in the room, the microphone would have picked it up.

[fol. 754] Your Honor, I think the tapes do not allow the jury to speculate. They get a very good idea what the conversation is about. The pauses are minimal at most and the inaudibilities are minimal at most, and where they are speaking together, you are able to discern the thread of it, where one of the participants is making a telephone reservation for an airplane and another participant is attempting to line up certain things for that evening. But the jury would be aware of the fact that nothing exculpatory is being said at that time.

Therefore, the People submit that as to the audibility of the tapes and as to the voice identification we have laid the proper foundation.

Now, as for the transcripts, Your Honor, we feel that they are an auxiliary to the jury to listen to these tapes. You will recall the jury has not heard the voice of two of the participants in the conversations that we intend to play. They have no way of identifying the voices that are actually speaking, other than the voice of Frank Jacklone, whom the jury heard from the witness stand.

So that the jury is not dipped cold into a conversation and tries to sort out voices which they have never heard before, the People submit that the transcripts are a necessary adjunct while they are listening to the tape so that they are able to identify who was speaking at the particular time.

We submit the People have laid the proper foundation as to the identification of the voices from Detective Cronin, and especially from Mr. Jacklone.

Therefore, under all these circumstances, Your Honor, we submit the tapes should be received into evidence and the transcripts should be given to the jury to follow the [fol. 755] conversations as the tape is being played.

Mr. Brill: I just have one observation, which I see I omitted, Your Honor. I think it is with respect to Exhibit 62 for identification.

The Court: Sixty-two for identification?

Mr. Brill: Yes, Your Honor, in which there is—

Mr. McKenna: Conversation of the 29th, Your Honor.

Mr. Brill: Thank you.

Is this 61 or 63?

Mr. McKenna: That is 63.

Mr. Brill: I beg your pardon. It is 63 for identification, Your Honor. At page 5 there is reported or attempted to be reported a telephone conversation engaged in by a person other than Mr. Berger, as indicated by the purported transcript.

I submit, Your Honor, that the interception of a telephone communication and the disclosure of the contents as a result of that interception constitutes a violation of Sec-

tion 605 of the Federal Communications Act; and that it is against the public policy of the State of New York to permit violations of federal law in the courts of the State of New York; and I urge that as an additional ground for the exclusion of the exhibit or for the exclusion from the jury certainly with respect to it.

Now, I just like to say one thing. I think Mr. McKenna has admitted to Your Honor that the purpose of these so-called visual aids to the jury is to impress upon the members of the jury that there was something of a conspiratorial nature said by Mr. Berger and that it would require these purported transcripts to bring home any such suggestion, because the name or initials of Mr. Berger appear on those purported transcripts.

[fol. 756] Mr. McKenna: Your Honor, we didn't intercept any telephone conversations. We recorded the voice of Harry Steinman speaking into a telephone. We don't have the other half of that telephone conversation. So I feel that the issue of wiretapping doesn't enter into it.

The Court: Gentlemen, I am fairly satisfied that the tape recordings have been properly authenticated and that at least in this respect they meet the test of admissibility.

Additionally, I am satisfied that since the last recording of the conversation of June 29, 1962, that all of those persons to whom the recording had been entrusted made no alterations or deletions or additions to the record; and I am satisfied from the evidence that the recording is presently in the same condition as when it was originally developed and deposited for safekeeping with the supervising investigator of the District Attorney's office on July 2, 1962.

Now, sound recordings are one of the new areas of evidentiary material that the courts in our age are obliged to consider.

The only issue remaining for the Court to determine is whether the recording heard twice by the Court contains such inaudible portions and breaks and pauses so as to

render it inadmissible. The real test of admissibility, as I read the cases, is whether there exists a residual thread of continuity and intelligibility of material matter which, in the Court's opinion, constitutes evidence of a probative value. I find that there does exist such a thread of conversation on these tapes, although thin in places, which is never completely broken. It represents evidence of a probative value and I'll admit the tapes into evidence. [fol. 757] People's Exhibit 61-A for identification now becomes 61-A in evidence, with an appropriate exception to counsel for the defendant.

(The object referred to, formerly marked People's Exhibit 61-A for identification, was admitted in evidence and marked People's Exhibit 61-A.)

The Court: Just one moment.

Nothing herein contained, of course, shall preclude defense counsel from making any application to the Court to delete such matter that is deemed irrelevant or objectionable on the recording, if counsel is so advised, and I believe I have already indicated to counsel that I would entertain such an application favorably, if such matter was pointed out.

I will hear you.

Mr. McKenna: Finally, Your Honor, on the issue of the transcripts, I believe that the jury should have the transcripts, as I said before, in order that they might better follow the conversation, in order to be able to identify the voices that are speaking. I think the jury can judge for itself whether the transcripts are accurate or not. But I am offering them only for the limited purpose so that they might be able to better follow the conversation, instead of hearing it cold and not being able to determine who is actually speaking. So just for the limited purpose of helping them follow the tape, the People offer in evidence Exhibits 62 and 63, the transcripts.



The Court: I will hear counsel for the defendant.

Mr. Brill: This is a most unrealistic approach to a problem in a criminal trial.

[fol. 758] The Court: Well, there is judicial precedent for it; *People against Feld*, 305 N. Y., clearly sustains the position.

Mr. Brill: I am not saying that, under proper circumstances, there may not be a proper transcript; but I am saying that these purported transcripts do not come within the contemplation of any court as being of value to a jury in assisting it. I am saying, if Your Honor please, that these transcripts become substitutes for the tape which Your Honor has received in evidence and that these transcripts, by the history of their origin and development, are not only suspect, but are damned, if Your Honor please, and they should not be permitted to be had by the jury so that the jury can read what several members of the prosecution say is on the tape as distinguished from what the jury and all of the members of the jury, each for himself, hears on the tape; and I press the objection.

The Court: The objection is overruled. The transcripts, Exhibits 62 and 63 for identification, heretofore so marked, are now received in evidence; and I intend at the proper time to submit them to the jury under certain cautionary instructions which I will give prior to the time that the transcripts are given to the jury; and an appropriate exception is allowed to the defendant.

Mr. Brill: Your Honor has noted my exception.

\* \* \* \* \*

Mr. Brill: Now, there is just one other thing. I don't know whether it is necessary to do this, in view of what we have characterized throughout this trial as the "general objection." My further objection is grounded upon the fact that these tapes and the purported transcripts, all of [fol. 759] which are now in evidence as a result of Your Honor's rulings, were obtained as the result of trespassory invasions of constitutionally protected areas and that, con-



sequently, they are inadmissible under the authority of the Supreme Court of the United States in the decisions theretofore presented to the Court in discussions of that particular question of law; and I would like the record to show that specifically, in addition to the other grounds, the objection is based on that ground as well.

. . . . .

The Court: I have ruled on that at least on one prior occasion. I held in substance, that evidence having been produced that the eavesdropping evidence was secured as a result of a duly obtained Supreme Court order, pursuant to the provisions of 813-a of the Code of Criminal Procedure, that the Court is obliged to receive such evidence. My recollection is that the highest court of the state has already ruled that the reception of such evidence, where obtained under a Supreme Court order, may be admitted into evidence.

Mr. Brill: I think that was prior to the Supreme Court's decision in the Silverman case.

Mr. McKenna: Well, I don't want to resume argument there, Your Honor.

May I make a suggestion just on timing. I have equipment to bring out, set up, also the earphones for the jury, Your Honor, which will take some time. May I suggest we break for lunch now and come back at a later time.

Mr. Brill: Just one minute, please. What Mr. McKenna says is that he means to offer the hearing of this tape with the aid of earphones.

I now want to interpose an objection to the use of earphones on the ground that this is a public trial and that [fol. 760] the utilization of earphones constitutes a denial of the defendant's constitutional (1878-A) rights under the Sixth Amendment and under the Constitution of the State of New York to a public trial.

I respectfully urge upon your Honor that there is not only no need for earphones, but that to permit the utiliza-

tion of them in connection with the audition of Exhibit 61-A in evidence further negates the defendant's right to a fair trial in violation of his Constitutional rights.

The Court: Well, I may make this observation, Mr. Brill, the highest Courts of the United States have said the use of earphones does not deny a defendant a right to a public trial, even though earphones are not supplied to the spectators in the courtroom.

Mr. McKenna: Just to obviate his objection, I am pretty sure we have it reproduced over a loud speaker, as well as the earphones, simultaneously, if Mr. Brill desires that.

\* \* \* \* \*

Mr. Brill: I submit, your Honor, that the only way you can conduct a public trial within the meaning of the Constitutional provisions, even with the use of earphones, is to insure that every member of the public, including the members of the press, be provided with such earphones. I think they are entitled to it.

Mr. McKenna: I have twenty-three earphones, your Honor.

The Court: If there are any left over we will give them to the press.

Mr. Brill: If there aren't enough for everybody in the courtroom, I press the objection.

\* \* \* \* \*

[fol. 761] Mr. Brill: I would like to add an observation, your Honor, in further support of my objection.

The Court: Yes?

Mr. Brill: It is that as I look at this courtroom it appears that two-thirds to three-quarters of the courtroom, in addition to the space provided for members of the press, is full of members of the public.

The Court: All right.

\* \* \* \* \*

## Afternoon Session.

New York, October 29th, 1964.

2:15 o'clock, p. m.

.....

(The following proceedings were had at the Bench without the presence of the jurors:)

.....

Mr. Brill: This is with regard to the question of earphones. I objected to the use of earphones with this jury, unless the members of the press and all of the members of the public in the courtroom are likewise furnished.

At the end of the session this morning I observed, and nobody contradicted me, that the courtroom was, in addition to the members of the press, from two-thirds to three-quarters full. As I look now I would hazard a guess that there must be twenty to thirty members of the public, if not more, in addition to the fifteen members of the press, sitting at the press table.

Unless every member of the public is likewise furnished with a set of earphones and each member of the press is [fol. 762] furnished with a set of earphones, I press the objection that the defendant is denied his right to a public trial pursuant to the provisions of the Constitution of the State of New York and the United States of America.

Mr. McKenna: Your Honor, the DiQuino case that was decided in the 9th Circuit, stated they were not denied the right to a public trial, or the Constitutional right to a public trial, if the jurors wear earphones while listening to a tape recording and the public cannot hear it at the same time. I don't believe that there has been a denial of the defendant's Constitutional rights here.

The Court: I will adhere to my initial determination. Bring in the jury.

Mr. Brill: And that means the press and members of the public who are now sitting the courtroom will not be furnished earphones?

The Court: Have you got an extra earphone, or two?

Mr. McKenna: I have one extra earphone that has been made available to the press. We have twenty-three sets, there are three members of the defense, two lawyers and the defendant, himself.

The Court: Of course, you understand there is nothing to preclude you from permitting the press to listen to this evidence, since it is in evidence.

Mr. McKenna: Right.

Mr. Brill: I count at least thirty-four members of the public, in addition to the five members of the press; your Honor.

Mr. McKenna: At the end of the day, after we have completed this and the jury has been excused, the press can listen to that tape through two earphones.

Mr. Brill: That is exactly the vice. A public trial is afforded to a defendant in a trial case, in a criminal case, [fol. 763] so as to insure that the public can monitor the trial and if there is any evidence which any member of the public has with respect to what is said or done, that member may come forward and furnish the information to the Court, the District Attorney, or to the defense, and to attempt to substitute for a public trial some proceedings had in camera by the District Attorney later on with the press, in one of the press conferences, does not satisfy the requirements of the Constitution of the United States.

The Court: It need not be in camera, you can have your client present, I will make it part of the trial.

Mr. Brill: It must be done in the course of the trial, your Honor, and I press the objection.

\* \* \* \* \*

Mr. Brill: Your Honor overrules the objection?

The Court: That is correct, sir.

\* \* \* \* \*

The Clerk: The jurors and the alternate jurors have been called, your Honor, and each answers present,

The Court: Members of the jury, in your absence there was offered by the People into evidence a certain tape recording which has been referred to throughout the testimony as Reel No. 5483, together with two transcripts.

You will recall that there has been testimony adduced to the effect that the transcripts were referring to a purported conversation which took place on the afternoon of June 28th, 1962, and a conversation of June 29th, both emanating from the office of one Harry Steinman, was an [fol. 764] accurate typewritten copy of what was contained on Reel No. 5483.

Now I want to administer at this time certain cautionary instructions, and I am asking each juror to comply scrupulously with the admonitions of the Court with respect thereto.

The two transcripts have been admitted in evidence for a limited purpose only, and that is that they may be utilized by you as an aid in following the conversations of the recordings.

Under no circumstances are these transcripts to be considered by you as evidence in chief; and that merely means this: That you are not to accept these transcripts as evidence as to what was actually said, because it is you, the members of the jury, and you alone, which determine what was actually said during the course of these conversations.

You determine the value and the weight of what you hear on the recordings. You and you alone determine what each person allegedly said.

Now I trust that this admonition to you, as to the manner in which the transcripts are to be utilized, is sufficiently clear and that you will abide by these instructions.

It should be crystal clear to you that we work as a team in this sense: The Court is charged with the obligation, the function of ruling preliminarily on the competency of evidence, and I have ruled that the evidence is competent, to the extent heretofore indicated by me. The recording is received in evidence, and the two transcripts are admitted for a limited purpose only.

However, while I am the exclusive Judge of the law, only you may determine the factual issues. I may not trespass into your exclusive area of determination, that [fol. 765] is, the factual area. That's what I want to make crystal clear to every member of the jury, that you and you alone determine what was said in the course of these conversations.

Now while the recording will be played only once at this time, this does not preclude you from hearing them again, so that if any one of you expresses a desire to have the recording played again, please make your wish known through your Foreman, and I will comply with your request.

You may proceed, Mr. McKenna.

Mr. McKenna: First, your Honor, may I just inform the jury that these earphones can be adjusted to fit your ear. You just loosen this little lever here and you can move it up and down (indicating).

I would also like to caution, the play of the wire connected to the box is not too great, so be careful and please don't try to adjust the plug in the box. You will notice the plug is in only half way. That's a special setting. Do not try to adjust it.

At this point, your Honor, I ask that copies of Exhibit 63 in evidence be deemed marked, so that I may distribute them to the jury and to defense counsel.

(Whereupon, copies of People's Exhibit 63 for identification were passed among the members of the jury by the court attendant.)

(Whereupon, the tape recording, People's Exhibit 61-A in evidence, was played for the members of the jury, counsel for both sides, the Court and the court stenographer, all equipped with earphones, and was heard by the court reporter, while reading the transcript, People's Exhibit 61-A in evidence, as follows):



[fol. 766] "Open six months already, you know—

"I told him—I told him.

"Didn't discuss no money or nothing—

"I don't know whether you did or not—

"I'll tell him—

"What's the difference? I told him a thousand or more.

"Yeah. But I want to be a nice fellow now and say look.

"So you take the other 250. What the hell the difference. A thousand dollars.

"You're right, you're not wrong. Ralph, you're right. But let me explain something. Let me explain something. If this kind, and it's not your fault or my fault or anybody—if this kid hadn't got hit so hard—Give Ralph a couple—a little bonus, you know—He may never get this money from Nat Roth. I don't know where Nat Roth is going to get—he can't hit the guy. What do you do with a guy like this?

"You keep—take a thousand every time—

"Hello.

"Yeah, John

"Yeah Bill. How are you, sir?

"Are you going tonight? They must be trying—

"I told you they're trying to tighten up the reservations.

"If he collects—his sister, you know.

"Oh, you did.

"Sure.

"What did you say?—

"The sister interested in the kid, in the kid, that's all—what happens—district attorney—with scandal—laying in the hospital—this man—you know—after all—bad situation, and it should be cleaned up for the kid's sake and [fol. 767] the sister's very worried. So I says I don't know—

"She didn't even know—I left the place. I did what she wanted me to do—

"This is what she asked me to do—

"Yeah.

"He's going to get it—district attorney—threats—no muscle—It's just a bad stink. So everybody gets hurt but he is going to wind up losing his license.

"Hello—

"The lawyer with the 1,000 bucks—2,000 more—do the best you can—

"—Do you think he'll stand—his old man—he's got \$100,000—

"Ralph, how sure are you?—

"I'm sure—look, there's money for you—money coming in—

"That's all, that's all—

"Fifty percent. Declare the other guy in—what to do and how to do it—I put in a call—

"They don't care—

"Two hours ago—three million dollars—I'd show it to him—he'll fall out of the bed—They're opening October 11.

"This is—warned them not to do—want to call it a key club—the city's got him by the nuts. It's in and out, the statute on the books of the State of New York—here's the way—a private key club like this—

"—be back at 1:30 or quarter to two, ten after two—

"—there's something about the law—gift shops—whether it's their gift shop or whether it's—

"Most everybody—

"What are you talking about?

"Something about the gift shops—

[fol. 768] "It's in the law—

"Which law?—

"I understand that—cigarettes, whether they're leasing it, whether they're holding it—

"You don't know what they're doing—

"No, I don't—give them a half a million—why should I break my balls? For what?

"Hello, yeah, yeah, yeah—I told this—I don't care about Brownie—I don't care about nothing—You don't understand—Brownie forget my phone number, I'll tell you that

—No it won't because I don't want it at a quarter to eleven—forget my number—I don't want it at a quarter to eleven. This guy's got to get it tonight and if I have to hook, crook, borrow or steal or beg I'll get it—it's a joke with everybody now—everybody got what they wanted. It's a joke—well, it is—unfortunate—let them dig up what they can and I will dig up what I can—but this man have that day—that's the word and that's the way it is—this man going to—this man worked too hard for this—let me tell you something because this was the toughest thing I ever encountered—this—almost—and you remember that Jerry and I'm sitting here waiting, and if I don't hear something from you people in the next twenty minutes—all right—O. K.

“Hello.

“No good. It's wonderful—when the guy is dying—not that anybody's—when the guy is down you do everything in the world—one o'clock. This man should have been worrying about the money—this man should have been—four o'clock, a quarter after four—this is grateful—Brooklyn or no Brooklyn.—Even five after six. This guy, this guy, they're independent.

[fol. 769] “They'll call Ralph, they'll call.

“I think—ruckus about it—figures you can be a nice guy—the guy could be—the guy don't want to deliver it—you see what I'm saying. This kind of a case, I swear, is worth fifteen thousand and I'm not bullshitting you: I mean it—This is a fifteen thousand dollar case because when a man is drowning, Harry, I paid. I paid fifteen thousand dollars for vigorish for a loan—he got fifteen thousand dollars, which was brutal. Why did I give it? Because I'm drowning. So what difference does it make? This is what I was trying to explain to you—sure—wonderful guys—so when I says to him it's going to cost you a couple of thousand extra because the lawyer's a thousand—for expenses. If Nat Roth can get ten, you understand—should be worth a little extra—believe me, they should go—I'm not wrong—I'll leave it to Sal Ross—I'm not a guy that likes to kick—

I never did that in my life never—what Tony thinks—injustice—they're right."

Mr. McKenna: Your Honor, I would like to have transcripts which are copies of Exhibit 62 in evidence deemed marked so that I may distribute them to the jury.

Mr. Brill: May the record show, Your Honor, that throughout the playing of Exhibit 63 for identification not a single member of the public had a set of earphones.

\* \* \* \* \*

The Court: Do you consider the press part of the public?

Mr. Brill: I consider that the press is a part of the public, but it is in addition to the general public, and that only one member of the press had a set of earphones.

[fol. 770] The Court: Has the District Attorney's office any additional earphones so that they may be made available tomorrow morning?

Mr. McKenna: Yes, Your Honor.

The Court: Not that I deem it credible or advisable, but I would like to satisfy Mr. Brill that every bona fide effort is being made to satisfy Mr. Brill's conception of a fair trial.

Mr. McKenna: May I make this offer, Your Honor. We have a loudspeaker. I don't want to attach it to this system because it drains current and weakens the reception of the sound. At the conclusion of the playing of the tapes through the earphones, if the jury does not desire a re-run, I will then replay the tapes for the public through the loudspeaker.

Mr. Brill: That does not meet the objection, as I read the cases. That does not meet it.

The Court: Are you summarily rejecting the offer of the District Attorney?

Mr. Brill: I don't consider it an offer, Your Honor.

The Court: He has made the offer and I consider it an offer.

I feel that in the present posture of this case, that is, the manner in which the jury is listening to this recording,

it satisfies the requirements of due process and the law which guarantees a defendant a public trial.

Does the jury desire a very brief recess at this point before we go into the second recording?

Then we will proceed.

Sixty-two now deemed.

Mr. Brill: May the record show that the operator—  
[fol. 771] The Court: Just a moment. Will you stop it.

Mr. Brill: May the record show that the operator of the equipment also has before him a copy of the transcripts which have been received.

The Court: Let the record show that fact and that the person who is operating the machine is Patrolman Nicholas John Hardy, Jr., Shield 3862, District Attorney's office Squad, New York County.

(Thereupon, Reel 5483 was played in the courtroom by Patrolman Hardy while the Court, the Defendant, Mr. McKenna, Mr. Goldstein, Mr. Brill, Mr. Levy, the Court Stenographer, and the jurors and the alternate jurors listened to the playing thereof with the aid of earphones, as follows: All matter which was indistinct to this Court Stenographer was omitted and the omission is indicated in the record by three spaced periods, thus: "...")

"Good morning.

"Good morning.

"I am sorry I'm late, but I had to get a check.

"...

"Yeah.

"And poor Ralphie, he wants to run to the other end of the world.

"I know.

"You all set for tonight, Frank?

"Yeah, more or less ... few things to do ...

"Listen, make out a check for ...

"Yeah.

"For a tensky.

"Now, listen.

"I brought a check.

"A what?

"I brought a wrong.

"It's all right, as long as it is your name on it.

[fol. 772] "A personal check?

"Yeah . . . all right.

"Oh, good.

"Make it out to Neyer for 250. Frank, now make sure you keep Brownie in the background for at least a month.

"Yeah.

"Until we get this monkey straightened out.

"Don't put . . . until you tell me . . .

" . . . do a thing.

"No, I don't put him on . . .

"How late can you . . .

"All right . . .

"Jimmy Neyer?

"No, Harry.

" . . . I cut him down to 750, Frank. Neyer, you know, he asked for money. I said, 'Look, the kid's in trouble. You're going to get \$750,' and he screamed. But that's it. From two thousand to seven-fifty.

"Poor Neyer, he had to wait around and ask for a couple hundred.

"Well—

"I told him if you do real well, Frank, you'll throw in a couple hundred more.

"That's right.

"To make it a thousand.

"You'll need that . . .

"No, 250 . . .

"Two-fifty . . .

"Two-fifty . . . five hundred . . .

"But I'm going to lay that out for you.

"You may have it by Monday.

"That's all . . . , I'm going to lay it out for you . . . and I told Neyer if you do . . . 750 is enough for him. Seventy-five hundred is supposed to be there.



[fol. 773] "It's there.

"I guess so. Here, count it.

"Count it.

"Ten fivers, there's 25 . . .

"Anything I can do for you today?

"No . . .

"You all set, got everything?

"Yeah . . .

"What?

"Stirrers, and I got to pick up a few . . . it's all . . .

"Stirrers, you know, you can pick up. This is all.

"Yeah, it's all little; it's nothing important.

"Like when you're going to phone, calling people.

"Yeah.

"Ralph, you think that's big enough, that set up for five in there?

"Yeah.

"You saw it yesterday. It's the only way I could see it you can really get your money back.

"It's ideal, ideal for the . . .

"Now, who actually are your partners, now that the three of us are together?

"Actually nobody.

"Nobody.

"Nobody.

"I know it's all your memory. This I know.

"That's . . . after a year or two years . . . After he worked . . . I'd give him a piece of the place. That means he's got to bring in business because he has no money in there.

"He tells you that; he makes no bones about it.

" . . . of this year.

"It's you. . . .

[fol. 774] "Pat . . . in there.

"Nothing.

"Ralph, you want to discuss that with the guy today or do you want to wait?

"What?

" . . . little bit.

"Oh, yeah . . .

"Fifty-five ones . . .

" . . . at the hotel . . .

" . . . it's all right.

"Either way, here . . .

"Why don't you let him mail them right out to you, Ralph? . . .

"All right, I'll bring it to you; it doesn't matter . . .

" . . . Brownie . . .

" . . . help . . .

"I cried last night.

" . . . I said and I meant . . . five minutes to three.

"Frank, I go across the street and lay it out for you . . .

"That's the only way.

"He said he was with Nat . . .

"Yeah.

"Who's calling?

"Harriet?

"What happened, Harriet?

"Have a good time.

"You need him for something?

"All right, hold on . . .

"Hello, Hello . . .

"111 North Wabash, Chicago.

"Yes, hello.

"Yes, Ralph . . .

"Yes, 148 East 48th Street. I have an office in there, 15 East 48th Street.

[fol. 775], "Well, this is the first time I ever had . . . reservation."

(Continued on the next page.)

(The foregoing proceedings were taken by this Court Stenographer in shorthand while listening to the tape recording with the aid of earphones and at the same time looking at a copy of People's Exhibit 62 for identification.)

This isn't your opinion, it is his opinion, we don't have to put the money up, he does.

Hey, George, you want to talk to him? That is your privilege, you know.

Do you want to get me down there tonight?

What time? . . .

I think Ralph clinched the whole thing, you know Ralph, he sat and talked to him at the hospital today.

Today?

Yeah.

I think they'll come across now, yeah.

No, I tell you, I am going to see—I will get that bank money—I don't know how to break it down . . .

Wait, a hundred . . . Yeah.

Wait a minute, fifty in dimes, a hundred and fifty in dimes.

How can I carry it.

That is a lot of dimes . . .

But what do you use so many dimes for?

Why am I breaking down so many dimes . . . breaking down dollar bills in dimes . . . yeah . . . Go ahead.

I got to get this.

You got a standby, or something.

How about Northwest—right now I'm calling—

Yeah, I called the TWA . . .

[fol. 776] I got to go to Newark—well Newark is closer than Idlewild . . . But you got to take a taxi—you, you don't got to 42nd—

But I will be at the hospital.

What is the difference, you go from the hospital to 42nd Street, you got a sixty cent ride . . .

Got to go to the West Side Terminal?

No, the East Side—

You going to go to Newark, you go to west side—you know what I mean . . .

You got four hundred in change in silver . . .

He is figuring for a long weekend, Friday, Saturday and Sunday, but that is a lot of change. But what do I do about fives and tens . . . how much . . . what do I get?

Oh, yeah, o. k., then . . .

More singles . . . I will get two hundred, is that enough?  
We had a two hundred bank at Goldbergs and we did a  
lot of business . . . four hundred in silver . . .

O. K. Yeah . . . All right.

I am going to meet George down there tomorrow night,  
he has got that . . .

All right, I will be down there in about an hour and a  
half.

All right.

We will get to the old man first that wants to put up  
the money to be Silverman's partner for the show.

O. K.

I will get to Silverman, first, you know, they don't want  
to lose this, they are looking for sixteen hundred a week  
for six weeks, or more, you know, but I will get to Silver-  
man.

Harry, I got to run.

The whole thing, I will speak to Silverman . . .

[fol. 777] They have got, you know, like . . . I am sorry,  
but I gotta run.

All right then, thanks.

Thanks.

I will see you tonight, good luck.

Good luck, Frank.

And keep your mouth shut and leave all the talk—  
(Pause on tape) . . .

I have it, but if you need it I will get it.

I got to get it for the kid, I got to give him a check for  
sixteen hundred—I got to give—I was going to ask the  
kid . . .

I am going to lay out the five hundred, I don't want to  
start up.

I am going to lay it out. I can't help it, Ralphie, I am  
this way, I could not get up the guts to do it. I just didn't  
have the guts, I don't know, I just didn't have the guts. I  
was going to ask him for it.

I mean, I think, I think the guy should pay it, I don't  
need it . . .

This five here, I will take off five hundred.

Huh?

There is fifty-five in hundred, right?

Yeah.

So I . . .

Just give him fifty of these.

All the hundreds.

That's all.

(End of recording.)

[fol. 778] (At 3:26 p. m., the jurors left the courtroom and there was a short recess, until 3:35 o'clock p. m., at which time the following proceedings were had in open Court:)

The Clerk: The People against Ralph Berger, on trial. The defendant, his counsel, and the District Attorney are present.

Mr. Brill: Your Honor, may the record show that during the time while the tapes were being made all three of the Court Reporters had before them copies of Exhibit 62 and 63, which they were ostensibly reading at the time they were making their stenographic notes with respect to that.

The Court: I will now state to the Court Reporters that under no circumstances should any one of them transcribe anything that was not actually heard. That was the precautionary instruction that I gave to the jury.

Mr. McKenna: I assume, your Honor, where they did not hear something, or they heard differently, they made such notations on their stenographic machine.

The Court: That would be in conformance with their duties.

Mr. McKenna: Your Honor, in view of Mr. Brill's request that this be open to the public, I now request that this reel be replayed. I will replay it through the loud speaker, and it can be optional with the jury whether they listen to it through the loud speaker, or through the ear-phones.

Mr. Brill: Your Honor, I object to this suggestion on the ground that the District Attorney has had his day at play on these tapes and that the jury has not yet requested that there be a replay, although your Honor indicated to the jury that at its request they could hear it.

[fol. 779] This is an offer made without regard to the jury's desires and it does not accomplish the purpose to which my objection originally was addressed. The District Attorney had the same equipment in court earlier when he played it with earphones as he has now, and I don't think that it is fair to play this thing twice, absent a specific request from the jury.

I object to it.

The Court: The objection is overruled. I see nothing more than a request to the Court on the part of the People's representative to have a witness who testified orally to repeat an answer.

Bring out the jury, please.

Mr. Brill: This is not that, Judge, this is an attempt to indelibly impress by reason of the auditory senses matter which obviously could not have been heard by amplification by a loud speaker under conditions that are abnormal.

. . . . .

The Clerk: The jurors are all present, your Honor.

The Court: Let the record show that the Court has received a communication from the Foreman of the Jury, reading, as follows:

"Judge Schweitzer: Some of the jurors would like to hear the tape again. Signed, J. Frank Lucas, Foreman."

. . . . .

The Court: Your request will now be complied with and you will note that in addition there appears to be a loud speaker contraption, so that the spectators and the press can hear it.

The Court: The June 28th conversation.



[fol. 780] (Whereupon, the tape recording, was replayed, and was recorded by the official court reporter, without recourse to a simultaneous reading of the transcript, as heard by him through the earphones, as follows:

"You know what—

"That has nothing to do—

"Six months already, you know—

"I told him—

"I don't know whether he did or not—

"What's the difference. I told him—

"What the hell's the difference—

"You're right, you're not wrong. Ralph, let me explain something. Let me explain something. It's not your fault, my fault or anybody. If this kid hadn't got hit so hard, you know—

"What do you do with a guy like this?—

"Hello.—

"Yeah.—

"John.—

"How are you, sir?—

"Yes.—

"I told him five.—

"Oh, you did—

"Yes—

"What did you say to them?—

"That's all—

"This is the thing—

"This guy, you know, after all—

"I did what you wanted—muscle—this stinks.

"Hello—thousand—couple of thousand—that's all—

"What to do and how to do it—

"Nothing—hours ago—fall out of bed

[fol. 781] "Warned them not to do—doesn't want them to call it a key club, don't you understand—books of the State of New York—

"We don't know what they're doing—give them the half a million—

"Why should I break my balls? For what?"

"Hello, yeah, yeah, yeah—you don't know this man—I don't care about Bronie—you don't understand. I'll tell you that—because I don't want it at a quarter to eleven, I don't want it at a quarter to eleven—he's got to get it tonight, if he's got to hook, crook, borrow or steal—everybody's got what they wanted—it's a job—well—I'm going to pick up what I can—that's the word and that's the way it is—I worked too hard for this—Let me tell you something, because this was the toughest thing ever encountered—this was almost—and if I don't hear from you people—all right—O. K.—allright."

"I worked too hard for this—

"This was the toughest thing I ever had. This is almost—

"If I don't hear promptly—

"All right. Okay—

"Hello.

"No good.

"Wonderful—

"—five after six—There's the first call now—

"You see what I say? This fellow—I swear—you know—He got \$15,000 in—\$15,000—He got \$15,000 worth of—

"Now, what difference does it make? If I don't need it, Harry, I blow the whole—so what difference does it make?

"Listen—

"—they're wonderful guys—

[fol. 782] "—couple thousand extra, because the lawyers—\$1,000—

"You know what that is—

"And I'll knock the—

"I never did that in my life, never."

Mr. McKenna: The 29th.

"—yeah—

"—night time—

"Yeah.

"Listen, make out a check—

"Yeah—

"What?—

"Yeah.

"Oh, good.

"Make it out to Neyer for 250—

"Make sure you keep Brownie—

"Harry, Harry—

"I cut him down to—750, Frank—Neyer. He asked for more and I said, 'Look, the kid's in trouble. You get 750 dollars.' From two thousand to 750—You had it.

"I told him if you do real well, you would drop him a couple hundred more.

"It is just 750.

"Seven-fifty?

"No, 250, 250. You got to give him \$500. I will lay that out for you. I am going to lay this out for you. I am going to lay this five hundred out for you—Seven-fifty is enough for him. Seventy-five dollars—

"Yeah.

"—250—

"Is there anything I can do for you?—

"You all set? Got everything?

"—nothing important—

"On the phone—

[fol. 783] "Yeah.

"Ralph, you think that is big enough, that set up for five?

"Yeah—

"That is the only way I could do this thing. I will do my best—

"Who asked for your advice?—

"Nobody?

"Nobody—

"—Ralph—nice day, or you want to work?—

"Fifty-five—

"Yeah—

"I am going to my father.

"Where are you going, to the hotel?—

"Ralph—

"I don't want to go there until after lunch—

"—arrangements—

"—maybe we can help you with now—

"—and I meant it—when I spoke to—15 minutes to three—

"Hello.

"Yeah.

"Yeah. Who's calling?

"Harriet?

"What happened, Harriet?

"Have a good time. You need him for something?

"All right. Hold on—

"Hello, hello—

"—11:40 to twelve o'clock—

"—well—Newark—close to Newark—

"What's the difference?—

"All right. I tell you what I will do—stand by the other one—

"Yeah—

"Sure—

[fol. 784] "Chicago, 111 North Wabash—

"Yeah.

"Hello.

"Yeah, Ralph.

"Harry Gross?

"Good. How are you?

"Oh, operator—reservation—a thousand a week so you wouldn't have to put up—

"Hotel here is at 148 East 48th Street. I have an office in 15 East 48th Street. Well, this is the first time that I have ever—reservations—

"Yeah—

"This is not our opinion; this is his opinion. We don't have to put the money up. He does.

"I have an office at 15 East 48th Street.

"Well, this is the first time that I have ever gone through here.

"This is the first time I have gone through with reservations.

"Yeah—

"That is your opinion—that is different—we don't have to put the money up, he does.

"I don't know whether I should call the other one.

"Heay, George, you want to talk to him, that is your privilege, you know.

"Do you want to meet me down there tonight?

"What time?—

"I am going to my brothers—

"That is a lot of dimes, yeah—what are these dimes for?

"You know, we've got a standby—be back in a little while—

"You have got to go to Newark, not Idlewild—Newark is closer than going to Idlewild—

[fol. 785] "No, you don't, you go to 42nd—but I've got to go from the hospital—

"What is the difference, you go from the hospital to 42nd, sixty cent cab.

"It's not downtown, it is west side.

"No, it's not west side—

"He was figuring for a long weekend, Friday, Saturday and Sunday, and that is a lot of change—

"O. K., all right.

"Two hundred bank—

"I'm going to get George down here tomorrow night. All right, I'll be down early—

"We'll get to the old man first, the one that put up the money for the show—get to Silverman first, you know they don't want to lose this, they are looking at sixteen hundred a week for eight weeks, or more, you know, but talking to Harry—all right—

"I will see you tonight, good luck.

"Good luck—

"I have it—I haven't it, but if you need it I will get it—I will give it to you—he asked for two thousand—

"You know what, I am going to lay out the five hundred—

"That is all right, Ralph asked for—you don't understand—

"You know, I couldn't get up the guts to do it, I don't know—

"I mean, I think that the guy should take it—all right, let's give him fifty—"

(End of recording, time 4:24 p. m.)

[fol. 786] SAMUEL LACTER, 499 Fort Washington Avenue, New York City, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKenna:

Q. Mr. Lacter, what is your occupation?

A. I am a certified public accountant, I am the Chief Accountant of the District Attorney's Office.

Q. Mr. Lacter, in your capacity as an accountant in the District Attorney's Office did you cause to be delivered to the Lee Berco Co., Inc., a subpoena?

A. Yes, I did.

Q. And did that subpoena request that certain records of that corporation be produced?

A. Yes, that is so.

Q. Were certain records of that corporation produced?

A. They were.

Q. Did those records include checks of that corporation?

A. Yes, they did.

Q. I show you People's Exhibit 53 for identification?

A. Yes.

Q. Is that one of the checks that was produced in response to the subpoena?

A. Yes, it is.



Mr. Brill: I have the same objection, your Honor; as at the time that the exhibit was not heretofore admitted, that is what we call the general objection.

The Court: Overruled, received in evidence.

(People's Exhibit 53 for identification was then received in evidence and marked "People's Exhibit 53 in evidence".)

[fol. 828]

*Summation*

Mr. McKenna:

Defense counsel is hoping that just one of you will be confused, one of you will—

Mr. Brill: That's an unfair statement, your Honor, and I ask your Honor to direct him to withdraw it, and to direct the jury to disregard it.

The Court: Denied.

You may continue, sir.

Mr. Brill: I respectfully except.

So all that you jurors have to find is, was there an agreement between Ralph Berger and one other person to pay money to Martin Epstein to influence Mr. Epstein to give somebody a liquor license. If you find that this is what the parties wanted in that agreement and that this is why the Playboy people and Frank Jacklone paid money to Ralph Berger, then you have found, No. 1, the existence of a conspiracy, you have found that there was in effect a conspiracy to bribe, and you have found that the parties had the intent to bribe when they passed that money through—

Mr. Brill: I object to that as a statement of the law which is not correct.

The Court: Members of the jury, as I indicated to you at one stage of the case: you and I work as a team in this sense, all factual issues are resolved by the jury, and as I said before, not even the Court may trespass in your exclusive area of resolving the issue of fact.

I, on the other hand, the other part of the team, will relate the law to you, and you are bound to accept it only from the Court. The cliché that is generally used, is that the Court and the Court alone is the fountainhead of the law.

[fol. 829] It might very well be that respective counsel, both lawyers, might desire to comment on some facet of the law. Now, while I will not charge you with respect to the elements of the crime of conspiracy to bribe in the exact language of Mr. McKenna, substantially he has stated the elements of that crime. And I will permit him to continue.

. . . . .

Now, remember once again, as I cautioned you in the *voir dire*, the People are not obliged to prove the fact that a bribe was paid to Martin Epstein. We are only obliged to prove the fact that there was an agreement to pay a bribe to Martin Epstein. We are obliged to prove that there was a payment of money to Ralph Berger which the payors believed was going to be paid to Martin Epstein. So once again we ask that you don't hold the People to the burden of proving that the bribe was actually paid.

Furthermore, the People are obliged to corroborate the testimony of the accomplices in this particular case. We must give you some independent evidence which tends to connect the defendant to the crime. Besides the testimony of the accomplices which is direct evidence, the People are obliged to put in other evidence which tends to connect Ralph Berger to the crime as charged.

Now, we have produced corroboration which is in the form of direct evidence, as well as other evidence which tends to connect, and I will give you an example: The tapes would be considered direct evidence; there you have Frank Jacklone talking with Ralph Berger; and you heard with your own ears the counting of the money—that would be direct evidence.

There is also circumstantial evidence in this case from which you can draw inferences as to what was actually

going on, and, an example of this was Detective Cronin's evidence, namely that at the time in Chicago when he was [fol. 830] present with the defendant the defendant surreptitiously attempted to tear up the card of Martin Epstein and Harry Neyer, and conceal those cards the pieces, out of the sight of Detective Cronin. From this you can infer guilty knowledge on the part of the defendant of his relationship with Martin Epstein—evidence which he was attempting to conceal from Detective Cronin; and from the fact of his attempting to conceal it you can infer guilty knowledge; and there you can confer again the intent of the defendant vis-a-vis his whole relationship with Martin Epstein.

. . . . .

They knew they might have trouble, and, court cases are never a certainty, and the courts in New York might deny them their license if they were forced to fight this thing through the court. So in the back of their mind they had this thought that perhaps they can avoid the legal battle, perhaps they could guarantee the success of their liquor license, perhaps they could get insurance that they were going to get a liquor license.

Granted, the Playboy officers didn't want to say We were bribers. They have a national magazine, they have a national reputation; and it is understandable that they didn't want to say We were bribers. They want to say We were victims. But I will show you their entire course of conduct throughout their relationship with Ralph Berger was that of bribers. They went ahead and they—

Mr. Brill: Your Honor, it seems to me the District Attorney is impeaching his own witnesses.

The Court: Do you have an objection?

Mr. Brill: I have, your Honor.

The Court: Overruled.

. . . . .

Now, I put Herman Ancel on the stand to show you that this had been a policy of the State Liquor Authority since 1958, that a key club operation—

[fol. 831] Mr. Brill: Your Honor, there is no such proof of that. There was some razzle-dazzle in Mr. Ancel's testimony about what he thought or he guessed, but there was no documentation to support anything like that.

The Court: Members of the jury, I have no independent memory of everything that every witness said, but I state to you now that if my recollection of any statement of a fact given as testimony in this case is in conflict with your own, that it is your recollection which will determine what the witness said. In my charge I will tell you that if at any time you desire any part or all of a witness's testimony read back, make your wish known and I will comply with it.

I must assume, in the case of both counsel, that when respective summations are delivered, that each counsel is giving you in good faith his recollection of what the witness said.

You may continue, sir.

\* \* \* \* \*

This is not conduct such as Mr. Brill has tried to point out. When the Playboy people are not going to get the type of license they want, they are not going to go through with their arrangement. They will pay for a restaurant liquor license but they will not pay for a not for profit license.

Where is the pressure? Where is the fear in that type of conduct? There isn't any more. Sure, there is apprehension, and there is anxiety, as any business man would have for the eventual success of his operation. No briber wants to part with his money if he can get this thing legitimate—

Mr. Brill: Your Honor, I object to that. A briber voluntarily parts with money as a matter of law.

Mr. McKenna: Will your Honor stop him from interrupting me?

Mr. Brill: No, that is a matter of law, and I am privileged to make that comment.

[fol. 832] The Court: I will allow him to make that comment.

Mr. Brill: I respectfully except.

Mr. McKenna: If he can get what he wants to, not paying money, that is all well and good, that's common-sense. But if a payment of money is required, a briber has an intent to pay, a briber has an intent to pay money for what he wants, and, this is what the Playboy people wanted. They were willing to pay. No one was trusting their word, and as a matter of fact Arnold Morton said when they told Berger they didn't want his services any more they were not afraid of him, he couldn't do anything to them. That was Arnold Morton's testimony.

So eventually Ralph Berger returns to them and says I have got Epstein calmed down and now I have got Mr. Big in New York who is going to be able to get you your license. And so they accompany Ralph Berger in to see L. Judson Morhouse. Now, what is the role of L. Judson Morhouse in this situation, and I think it's crucial. In your determination of the conduct of the Playboy people, they were going to Morhouse to get Epstein to go along with them,—Morhouse was to influence Epstein in return for his hundred thousand dollars, and if he couldn't influence Epstein he gave the Playboy people two alternatives: No. 1, he would give them a new commissioner because Epstein is close to retirement, and he will appoint his successor; or No. 2 he will get them legislation in Albany which will enable them to operate the way they want.

Now, this is in effect the Playboy people going to Morhouse to get Morhouse to influence Epstein to give them what they want. Epstein still wants his fifty thousand dollars, according to Ralph Berger, and he must be paid that money to soothe his feelings. But eventually they are



pressuring Morhouse to influence Epstein to give them something that Epstein thought he could not do. The policy of the S. L. A. was that this was an illegal type of operation.

[fol. 833] And so they enter then into the agreement with Ralph Berger, once they satisfy themselves that Morhouse is going to get them what they want. There is anxiety, yes. There is apprehension over the success of their business, yes. They have advertised they are going to open up in New York, yes. But essentially their motivation is they want that liquor license and they are willing to pay for it if they are going to get a guarantee they are going to get it, and, that is essentially the conduct of the Playboy people.

True enough, they said they would rather not have done that.

They thought they only wanted something that was legal. They were not asking for anything they thought was illegal. And, therefore, constantly they repeated on the stand they didn't think they were entering into a bribe situation.

But you will recall when I asked Arnold Morton: Does your definition of bribery include paying for something you feel you are entitled to? Mr. Brill raised the objection, and said that is not the definition of bribery, and, that's precisely it, the definition of bribery is broader than paying for something you are not entitled to. It encompasses paying for something you are entitled to.

So we come eventually to June, the end of 1961, where the Playboy people have said to Ralph Berger "All right, we are going along with you" and they say "We will pay you \$25,000 as the first instalment; you nominate your designees", and Ralph Berger comes up with the firm of Lee Berco Co. Inc.

Now, this is important. You recall Mr. Kelly's testimony on the stand, and through Mr. Kelly I put in the



transcripts of account of Lee Berco Co. Inc., and on that transcript of account the opening deposit is 1500 and 16 [fol. 834] dollars and 83 cents, which was the first payment of expenses by the Playboy Club to Ralph Berger for his services in getting them their license. In effect, Ralph Berger had to dust off this corporation and open up a bank account in order to funnel through that amount, the moneys he was going to receive from Playboy. Because Playboy insisted on paying by check—they didn't have the cash. So, I wonder if you can call him a real-estate man, when he doesn't even have a bank account. He has to open one up in order to receive the moneys he is getting from Playboy. The opening deposit is \$1516.83.

Then the second check comes, or is dated on June 28th, in the amount of \$12,500., and you recall that on June the 29th there is a deposit of that check in The Michigan Avenue National Bank in the account of Lee Berco Co. Inc. This is important, because that same day Ralph Berger has a ticket for an airplane trip to New York; he is going to leave at five o'clock for New York. And you recall the testimony of Mr. Kelly, that at three o'clock the bank in effect closes its books, and they receive all deposits after that and charge them to the next day, and the deposit ticket is dated June the 29th. It's actually, the bank stamp, shows June 30th. We can show you that between three o'clock and five o'clock Ralph Berger drew \$9,000. against the first \$12,500 check; and a short time thereafter he got on a plane to New York.

Now, why does a person carry \$9,000. in cash on a plane to New York? This is another piece of circumstant: evidence tending to corroborate what the People's witnesses have testified to. And, Robert Preuss said at that meeting where he turned over the two \$12,500. checks to Ralph Berger: He said he was going to cash the checks, keep a reserve for taxes, and pay the rest to Martin Epstein".

And what do we have? We have the \$12,500 check being deposited, and \$9,000. being drawn against it. He has

[fol. 835] kept a \$3500. reserve for taxes, and he is taking \$9,000. to New York with him.

And, what happens to the \$12,500 check that is given to him for Harry Steinman? The testimony of the bank official, you remember Mr. Timothy Dempsey was "This check was cashed". Harry Steinman received \$12,500 in cash, in return for that check.

Once again you can ask yourself Why do they need cash? They need it in order to pay it over. Circumstantial evidence again tending to corroborate the testimony of the People's witnesses that they gave Ralph Berger this money in order to pay Martin Epstein.

And so we go through 1962. And in 1962 Ralph Berger receives the final ten thousand dollar payment for his services.

All he was, was a messenger, according to Mr. Brill. All he was, a "Patsy." And in return for being a "Patsy" and a messenger, he received twenty thousand dollars—hardly a "Patsy," hardly a messenger boy. Rather, a key agent of Epstein, the man you had to see to get to Epstein, the man who could deliver Epstein and get you your license, in spite of it being illegal, in spite of the objections of the City Board. "If you went through the right people," as Ralph Berger first told Arnold Morton, "you're not going to have problems. If you don't go through the right people, like in the case of Burton Brown and the Gaslight Club, you're going to have all sorts of problems."

So Ralph Berger, right from the start, painted himself as the key man, and he was paid as a key man. And the whole conduct of the Playboy people toward Ralph Berger and his conduct toward them was more than a messenger, was more than a "Patsy."

[fol. 836] Now Mr. Brill has said that Frank Jacklone lied in the grand jury, and therefore you have a right to disregard all of his testimony.

What is the motive of Frank Jacklone in testifying here? What was his motive in not telling the truth when he first testified in the grand jury. And you might remember he corrected that testimony before the very same grand jury. He went in and admitted he lied. And why did he lie? He lied to protect Harry Steinman, whom he regarded as a friend, who he regarded as the man who had helped him when he was in real trouble with his license. This is understandable. It's not condonable. He shouldn't have done it. But the fact is he did do it, and it's understandable how he was trying to protect Harry Steinman.

\* \* \* \* \*

All he was trying to do was to minimize the complicity of Harry Steinman, whom he regarded as a friend. But he did not change the essence of his testimony, that he had paid ten thousand dollars in order to get his liquor license, and that ten thousand dollars went to Ralph Berger, and Ralph Berger told him that the money was going to Martin C. Epstein.

We have corroborated, in many essentials, the testimony of Frank Jacklone through the police witnesses. The first time that he meets Ralph Berger a police officer is at the table alongside of him, and you hear his statement to Frank Jacklone, "I just saw him, it's going to be all right." That same police officer had, just a short while before, witnessed Ralph Berger going into the hospital room of Martin C. Epstein, exiting from that hospital room and going directly to Kenny's Steak Pub.

\* \* \* \* \*

[fol. 837] You've heard Detective Poulos testify that he observed Mr. Berger go into that hospital room after his meeting with Frank Jacklone, and I want to go back to Walter Finley's testimony a bit.

On the evening of June the 27th, 1962 Ralph Berger is observed going into a telephone booth, and he says he "just called down there; the approval was in."

\* \* \* \* \*

And you recall the tape of June the 28th, 1962, how upset Ralph Berger and Harry Steinman are, and Harry Steinman speaking on the telephone to someone and he's saying, "Tell Brownie to forget my number. They were supposed to have the money. This man"—and I'll read the exact testimony to you.

"This guy's got to get it tonight, and if I have to hook, crook, borrow, steal or beg, get it. It's a joke with everybody now. Everybody's got what they wanted. Well, it's unfortunate. Let him dig up what they can and I'll dig up what I can, but this man have it there today. That's the word and that's the way it is. This man worked too hard for this. Let me tell you something, because this was the toughest thing I ever encountered".

If you recall that conversation, you can hear the voice of Ralph Berger in the background, prompting Harry Steinman what to say—

Mr. Brill: Now that is an outrageous statement, unsupported by any evidence, and there's no basis for that inference. I object to it.

The Court: Members of the jury, again I recall to you what I earlier said. It is you and only you who determine what the persons engaged in the conversations on the afternoon of the 28th of June, 1962 and the morning of June 29th, 1962 said. Again I say I will assume, and fairly assume, that what each counsel said in his respective summation was said in good faith. But, in the final [fol. 838] analysis, if you didn't hear it, disregard Mr. McKenna's statement.

\* \* \* \* \*

And there is further conversation on that day, where Ralph Berger is saying, in effect, "This is gratitude for you."

And there's other conversation about whether or not they're going to charge Frank Jacklone additional money on top of the ten thousand dollars for their services. You will recall Ralph Berger saying, "This is a fifteen thou-

sand dollar job, Harry." He says, "If Nat Roth can get ten thousand, this job is worth fifteen thousand dollars."

So this takes us, then, to the crucial date, June 29th, 1962. And on that date you heard Frank Jacklone testify he delivered seventy-five hundred dollars. You heard police officers testify they observed him in the company of men that morning, and they followed him from those men into the office of Harry Steinman. The times match. Also, in that office Frank Jacklone told you what happened. They observed him leaving, and Ralph Berger is kept in constant observation until he actually is observed going into the hospital room later that afternoon.

What happens? There is a discussion between Harry Steinman and Ralph Berger, after he leaves, and Ralph Berger says, "I'm going to take five hundred dollars here off the top. Just give him fifty hundreds. Just give him the hundreds, that's all." From this, I think it's a fair assumption that five thousand dollars was delivered to Martin Epstein that afternoon, Twenty-five hundred was retained, Mr. Berger was making a nice little profit for [fol. 839] himself. Mr. Berger, our merchant of corruption in this particular case, Mr. Epstein's key man, is always well paid for his services. And not only that. He isn't satisfied with that twenty-five hundred dollars; he's planning to ask for additional moneys from Frank Jacklone, once they're able to get the money back from Nat Roth that has already been delivered to Nat Roth—hardly the act, once again, of a messenger boy.

[fol. 843]

#### COURT'S CHARGE

The Court: Members of the jury, we have reached that point in the case when it becomes incumbent upon the Court to charge you with respect to the applicable law. I know



that sensible men and women who have performed their public duties to the best of their ability do not usually seek thanks or public acknowledgment for the performance of such duties, but I cannot let this opportunity pass without commenting upon the manner in which this jury has discharged its duties up until this point, particularly the close attention, the fine interest and the patience which you and each of you have shown throughout the trial, and the seriousness with which you have assumed your duties in this most important matter.

Nothing is more important in a person's citizenship than the performance of his or her full duties as a juror. The public may feel secure that so far as you are concerned justice will be done by you members of the jury who as an arm of the Court have given without complaint of your time and your painstaking efforts. Now no doubt you will give your best judgment with the sole aim to do justice in a case where so important a decision is pending, involving as it does the enforcement of our laws, and the individual rights of this defendant.

[fol. 844] During the course of this trial you have undoubtedly become aware of the fact that we are both judges in a very real sense, I am the judge of the law, and the jury is bound by its oath to accept the law as I give it. No discretion whatsoever vests in any jury to divert from the principles of law set down by the Court.

You on the other hand are the sole and exclusive judges of the facts. Examine the facts calmly and carefully in the light of the law as set down by the Court, and in that manner you will determine your verdict.

For purposes of clarification I will divide my charge into three parts. First I will relate to you certain principles of law applicable to criminal cases generally. Secondly I will, as I am required to do, very briefly outline the highlights of the testimony of the various witnesses who have testified at this trial. And lastly we will examine into the indictment, and, I will charge you with respect to the law applicable to each of the crimes on which you will be re-



quired to deliberate, and in connection therewith I will recount certain additional principles of law applicable to the issues in this case.

In reaching your verdict you should apply the law to all of the credible testimony that has been adduced at this trial. You should do so as far as is humanly possible without sympathy and without prejudice to either side.

You are to disregard the fact that I may have denied motions of counsel on either side during the course of the trial. I charge you also that you are to disregard the fact that I may have either overruled or sustained objections of counsel. Attempts by counsel to introduce evidence which the Court excluded and all arguments on questions of law and the admissibility of evidence by either counsel must be disregarded by you in your deliberations.

You are also to disregard answers of witnesses that were stricken out, and all other matter that the Court ordered [fol. 845] stricken out, or matters not permitted in evidence. If by an excluded answer of a witness or by an offer of testimony which was excluded or by any question which was not allowed, any suggestion was conveyed to your mind of things not in evidence, then those suggestions should be resolutely removed from any consideration by you. Our law goes so far as to say that not even the Court has the right to indicate to you its opinion concerning the guilt or innocence of a defendant, and, I take this opportunity to point out to you that this Court has not indicated any opinion with respect to the guilt or innocence of this defendant and you are not to look for any opinion on the part of the Court from anything that the Court may have said throughout this trial.

Again, I stress that I may not encroach upon your exclusive province to determine all of the factual issues, and if at any time I asked a question of a witness or made any comment during the trial with respect to any ruling from which a possible inference might be drawn that I felt one way or the other with respect to a factual issue, then I charge you to disregard such comments or inference. The

determination of all of the facts rests solely in your hands, and I may not directly or indirectly influence you in respect thereto.

I charge you that you are to decide this case not upon the addresses of counsel on either side, but upon the testimony that has been given to you from the witness chair and the Exhibits which the Court allowed in evidence. Arguments of counsel as far as they tend to elucidate the evidence and to explain its meaning to the jury and to suggest conclusions which might be drawn therefrom are to be considered by the jury, but any statement which may have been made by counsel on either side outside of and beyond the evidence is to be disregarded by the jury and given no weight whatsoever.

No statement of either counsel is to be accepted by the jury as a substitute for proof. The jury is to determine [fol. 846] the case solely upon the proof and the sworn evidence, that is, the testimony adduced and the Exhibits which I have permitted in evidence. One of the Exhibits which I have allowed into evidence is the tape recording of two conversations purportedly participated in by this defendant and others in the office of Harry Steinman,—one conversation on the early afternoon of June 28th, 1962, and a second on the following morning.

Let me charge you with respect to the law applicable to your consideration of eavesdropping evidence. We have a provision in our law, Section 813A of the Code of Criminal Procedure which permits the District Attorney's office to apply to a Justice of the Supreme Court for an Order authorizing the planting of an eavesdropping device at a particular location. In the instant case the evidence that you have heard on the tape recordings was secured pursuant to such a Supreme Court Order, and, I hold as a matter of law that such evidence is legally admissible for your consideration.

I charge you therefore that without regard to any individual prejudice that any juror might possibly entertain because of the manner in which such evidence was obtained,

and I am not suggesting that any juror does in fact entertain any such inherent feeling of prejudice, yet nevertheless as jurors it is your obligation to consider that evidence on the same basis as you are required to consider any other evidence in this case. Its weight and value, however, just as it is with respect to all other evidence, is always an issue of fact for you to resolve.

It is for you and you alone to determine what value and weight you desire to give to the tape recording.

Now, let me again relate the cautionary instructions heretofore given to you during the trial with respect to the two typewritten transcripts. You will recall that the typewritten transcripts, the accuracy of which had been certified by Detectives Reilly and Berkowitz and Frank Jacklone were received in evidence, for the limited purpose [fol. 847] of permitting you to utilize them during the playing of the record of these conversations.

You were permitted to look at them only as an aid in following the conversations of the recordings, and for no other purpose. They are not to be considered by you as evidence in chief. That is, they are not to be accepted by you as evidence as to what was actually said during these conversations. It is you and you alone who are to determine what the parties said, and, this of course may only be gleaned from having listened to the recording. I therefore charge you that while the Court has ruled on the competency of the transcripts as evidence in this limited manner, nevertheless the value and weight that you are to give to the contents of these conversations are solely an issue of fact for you members of the jury to determine. You and you alone and not the officers who testified to the accuracy of the transcripts or Frank Jacklone are to determine what was said by the parties whose voices you heard on the tape recording.

As judges of the facts you and you alone determine the credibility of the witnesses who testified during the trial. You determine to what extent you care to believe or disbelieve the testimony of each of the witnesses. In making

this evaluation you should take into consideration the conduct, the appearance, and the demeanor of the witness upon the witness stand, particularly his frankness or lack of frankness. Take into consideration the interest, if any, that the witness may have in testifying one way or another. Consider the motive that a witness may have in giving testimony. Consider the witness's relation to or feeling for or against this defendant. Take into consideration the probability or the improbability of the witness's statements, and the opportunity that the witness had to observe and to be informed as to the particular matters respecting which such witness gave testimony and the inclination of the witness to speak truthfully or otherwise as to matters within his knowledge.

[fol. 848] In this case the People have called as witnesses three officers of Playboy Clubs International,—Arnold Morton, Robert Preuss, and Victor Lownes, and the principal of the club called the Tenement, one Frank Jacklone. By virtue of the testimony given by each of these witnesses, I charge you that each if believed by you is a co-conspirator and an accomplice of this defendant as a matter of law. Later in my charge I will relate in some detail the legal significance of a co-conspirator and accomplice.

Now, two of these witnesses have testified that they were given immunity from prosecution for any crimes disclosed by their testimony given before the grand jury.

Let us now direct our attention to the law that should serve to guide you with respect to the testimony given by co-conspirators and accomplices and those witnesses who have received immunity from prosecution from crimes disclosed by their testimony given before a grand jury. Our law does not say that because a person is a co-conspirator and accomplice or has been given immunity from prosecution for any crimes disclosed by his testimony, that his testimony must be disregarded. If that were the state of the law it would be useless and it would serve no purpose in calling these persons as witnesses. What the

law does say is this: In determining what testimony to accept or reject, you have the right and it is your duty to consider whether any witness has any motive in giving false testimony on the witness stand. If you find that there was such a motive, then make up your mind whether or not that motive has caused the witness to depart from the truth, and what credence you care to give to his testimony.

In short then, all such matters such as an interest in the outcome of the case, a motive to lie, any criminal acts previously committed by a witness, are matters which the jury should take into consideration in weighing the evidence, that is, in determining the degree of credence that [fol. 849] you care to give to the testimony of such witness.

In these cases that come before you as jurors, the People naturally have to take witnesses from the surroundings of the alleged crime. They cannot create witnesses. They have to take them where they find them, and they have to take them as they are. If jurors should say that every such witness must necessarily be perjuring himself on the stand, then of necessity a great many crimes that would come before juries would go unpunished. On the other hand, jurors should naturally scrutinize most carefully and cautiously the evidence of such witnesses before making up their minds to place reliance upon their testimony.

Now that I have explained your function I think I should caution you not to go beyond your function. For example, on the question of immunity, do not confuse your function as judges of the facts with the function of the District Attorney or the grand jury. Your function is to decide whether these witnesses who received immunity are telling the truth, and, it is not your function to determine whether or not these witnesses should or should not have been granted immunity.

If you believe that any of these witnesses have told you an untruth because they were free from prosecution, then you should reject any such testimony. On the other hand, if the defendant is guilty of a crime, then you are not to



acquit him because you might have the view that these witnesses should not have been granted immunity.

I have now related to you the factors which I commend to you for consideration in evaluating the degree of credence that you are to give to the witnesses who have been given testimony in this case. With all of these factors taken into account, together with all of the other facts and circumstances given as evidence, it is within your province to give to the testimony of each witness such value and weight as you deem it deserves.

[fol. 850] I charge you further that if you find that any witness has lied in a material aspect of his testimony, you have the right to disregard his testimony completely. You don't have to believe anything that that witness said. It is, however, within your province to dissect such testimony, and believe any portion of it to which you give credence, and disregard that portion of the witness's testimony that you disbelieve.

Under our law a defendant may testify as a witness in his own behalf, and, equally true is the fact that he may choose not to testify. In this case, as you know, the defendant has chosen not to testify, in which event our law states that his neglect or refusal to testify in his own behalf does not create any presumption against him. So that when you deliberate with respect to this defendant's guilt or innocence you may not take into consideration the fact that he has chosen not to testify as a witness in his own behalf.

The defendant in this case has entered a plea of not guilty, and such plea constitutes in law a denial of all of the elements of each crime charged against him. That denial places the burden upon the People through the District Attorney of establishing the guilt of the defendant beyond a reasonable doubt before a jury can find him guilty. That burden never shifts from the People at any stage of the case, and, the defendant at no time is required to establish his innocence.



Under our law a defendant is presumed to be innocent, and that presumption rests with him throughout this trial. He is cloaked with the protection of this presumption even when you go into the jury room to commence your deliberations, and it remains with him until that moment arrives when you as jurors are convinced from the proof submitted by the People that he is guilty of the crime or crimes charged against him, beyond a reasonable doubt. When that point is reached in your deliberations, the presumption [fol. 851] of innocence is destroyed. This necessarily places the burden of proof of adducing such evidence upon the People. In other words, the defendant is entitled to rest upon this presumption of innocence in his favor until the presumption is so far outweighed by evidence offered by the People that you as jurors are convinced of his guilt of the crime or crimes with which he is charged beyond a reasonable doubt.

This means also that the People must establish every element of the crimes that he is charged with beyond a reasonable doubt, and the defendant is entitled to the benefit of every reasonable doubt arising out of the evidence or the lack of evidence in this case.

Now, there must necessarily come to your minds this question: What is the meaning of the expression "reasonable doubt"? There is nothing mysterious about these words, because implicit in them is their own meaning. It means exactly what the words themselves imply. A reasonable doubt is a doubt based upon reason. It is a doubt for which a juror could give a reason if he is called upon to do so in the jury-room. It must be a doubt based upon the evidence or the lack of evidence in the case. A reasonable doubt has been defined as an actual doubt,—a doubt that you are conscious of having after going over in your minds the entire case and giving consideration to all of the testimony and every part of it.

If you then feel uncertain and not morally convinced that the defendant is guilty, and if you feel that you are

acting in a reasonable manner, and if you believe that a reasonable person would hesitate to act because of such doubt that you are conscious of having, then that, members of the jury, is a reasonable doubt. When that exists it belongs to the defendant and, with respect to the crime that you may then be deliberating upon he is entitled to a verdict of acquittal. This does not mean that a reasonable doubt may be predicated upon some kind of a whim or a guess or a surmise or a conjecture on your part; nor should [fol. 852] it be considered by any juror as some type of a bulwark or a shield behind which a juror might hide in order to avoid doing a painful or disagreeable duty.

I charge you further that a doubt not legitimately warranted by the evidence or lack of evidence or a doubt born of a merciful inclination to permit a guilty person to escape the law, or one prompted by sympathy or fostered by prejudice, is not what is meant by a reasonable doubt.

I charge you further that there is no obligation on the part of the People to establish the elements of any crime beyond any or all possible or conceivable doubt or to a mathematical certainty.

During the course of the trial there has been reference made to the fact that this defendant has been indicted by a grand jury of New York county. I charge you with respect to the legal import of such indictment that it is no proof of anything. It may well be described as a document which must first be found by a grand jury and filed by the District Attorney in this court before a defendant is actually brought to trial before a petit jury.

So that when you deliberate in this case you must not under any circumstance mention the fact that an indictment has been found by a grand jury charging the defendant with the crimes of conspiracy to commit the crime of bribery of a public officer, because the finding of an indictment carries with it no probative value whatsoever.

I am also required to charge you with respect to the element of punishment. In reaching your determination as to

the guilt or innocence of the defendant you are not to be concerned about the fact that if he is found guilty that judgment must be imposed upon him as prescribed by law. If this defendant committed any acts which amount to a crime, then the responsibility for the consequences flowing from those acts are his. They are not yours and they are [fol. 853] not mine. And if he committed no acts which amount to a crime, then of course he has no criminal responsibility.

So decide this case upon the law as I have given it to you and on the facts as you find them to be, and let the chips fall where they may without any consideration on your part as to the consequences of your verdict.

Now, this brings us down to the second part of the charge wherein I will briefly recount to you the highlights of the testimony given by the respective witnesses, as I am required to do, and I state to you that what I say is based primarily upon written notations that I made during the course of the trial as well as my own independent recollection of the testimony.

Arnold J. Morton was the first witness called by the People. He is the vice president and operational director of Playboys International; and he briefly outlined his duties with the Playboy clubs. He stated that in 1960 that organization was operating one club in Chicago, and was planning to locate in other cities. Sometime in June or July of that year the defendant came into his restaurant and spoke to him, and told him that he the defendant was aware of the fact that the Playboy International was going to encounter some problems in getting a liquor license for their contemplated club in New York. Morton in turn told him that he could not understand why. And, the matter was left in that posture. Some two or three weeks later they met again, and the defendant then told the witness that the Chairman of the state Liquor Board, Mr. Martin Epstein, was going to be in Chicago; and Morton invited both up to visit their Playboy club operated in that city; but they never came to the club.

R About a week or two later the defendant again spoke to Morton in his Chicago restaurant, and told him that he had seen Mr. Epstein in Chicago and that the latter was very much upset by their manner of operation and [fol. 854] their mailings to solicit members. It was at this meeting that the defendant allegedly told Morton that Chairman Epstein said it would cost fifty thousand dollars in order to approve a liquor license for the Playboy club in New York. And the defendant also stated that he himself would be taken care of out of this fifty thousand dollars. Morton asked him why he had to make this payment, and the defendant allegedly told him that the Gaslight Club in New York paid sixty thousand dollars.

Morton asked him why he had to make this payment and the defendant allegedly told him that the Gaslight Club in New York paid sixty thousand dollars and they still were having their problems, because they did not clear through the right channels. Morton then told him that he would have to discuss all of this with his associate.

In August of 1964 the witness, Mr. Morton, went to New York to keep an appointment arranged by Mr. Berger with Mr. Epstein, in order to discuss this liquor license. In New York the witness was introduced to Martin Epstein by the defendant in the lobby of 270 Broadway, but no meeting was had because of Mr. Epstein's prior engagements.

In September of 1960 the defendant contacted Mr. Morton again and told him that Mr. Epstein was upset because of their mailing program and advertising operations, and he brought Morton to Hyman Siegal, who was subsequently retained by Playboy as the attorney who should file for their liquor license.

Mr. Morton and the defendant went to New York in October or November of 1960 and met with Mr. Siegel and discussed this liquor license problem. In November Playboy International purchased a building at 5 East 59th Street for seven hundred and seventy-five thousand dollars and spent an additional three hundred thousand dollars for architect's plans and other services.

[fol. 855] In December of that year the defendant met Mr. Morton again and told him that the State Chairman, Mr. Epstein, was still troubled with their mode of operating. A New York meeting was set up by the defendant for Mr. Hefner and Mr. Lownes to meet and speak with Mr. Epstein.

The witness met the defendant again in December of 1961. He told the defendant that Hefner and Lownes got nowhere with Mr. Epstein at their New York meeting because the latter could not tell them in what manner their operation was illegal and that the Playboy organization would seek relief in the courts.

The defendant told Mr. Morton that he was told by Epstein that Hefner and Lownes had acted like a couple of boy scouts, that he could not work with them. Thereupon, Morton told the defendant that he wanted no further business with them and the latter asked for seventy-five hundred in addition to the fifteen hundred which he had already received for his time and efforts.

The witness stated that he compromised this request—that is the defendant's claim for seventy-five hundred dollars—for the sum of five thousand dollars, and he gave him a check in this amount.

In May of 1961, the defendant came back to Morton and told him that Martin Epstein was all smoothed out and that a Mr. L. Judson Morhouse, the Chairman of the New York State Republican party, wanted to meet with him. This appointment was set up by the defendant in New York and the defendant told Mr. Morton that the same deal to pay Martin Epstein fifty thousand dollars was still on and that Playboy would have to make its own deal with Mr. Morhouse.

The New York meeting with Mr. Morhouse was kept in May of 1961 and at this meeting Morton told Morhouse that he wanted a certain type of liquor license. Morhouse allegedly said that he wanted a hundred thousand dollars in stock options, a twenty thousand-dollar annual retainer [fol. 856] for at least five years. He also wanted gift shop



concessions in all of the Playboy clubs throughout the country.

Morton returned to Chicago and discussed Mr. Morhouse's terms with his associates, after which he returned to New York and met again with Mr. Morhouse. The latter was told that the operation of the gift shops and the granting of any stock options were out of the question, but that the twenty thousand dollar annual retainer was agreeable to him, that is, Mr. Morton and his associates.

Morhouse met with the principals of the Playboy at their Chicago office in June or July of 1961, at which time Morhouse told the principals that the annual retainer agreement of twenty thousand dollars would have to be made with the Playboy Magazine, only, and not with Playboy Clubs International, and he told the principals of Playboy to use a Mr. Jerry Marrus as an attorney to file their application for a liquor license.

After this meeting Morton and the defendant met and the latter asked for twenty-five thousand dollars in cash for Martin Epstein. The defendant was told that no cash was available, whereupon the defendant agreed to accept two checks, each in the sum of twelve thousand five hundred dollars and he, the defendant, told Morton to whom the check should be made out.

These two checks, one to Lee Berco Co., Inc., and a second to Harry Steinman, were given to the defendant on June 28th, 1961. The defendant said he would be required to cash these checks, pay the tax on them, and deliver the net balance in cash to Martin Epstein.

In July or August they met again and the defendant told Morton that Martin Epstein refused to give him any part of the cash, but kept it all, and after some discussion Morton agreed to give the defendant an extra fifteen thousand dollars which he was to retain for him- [fol. 857] self. Thereafter, Morton and the defendant met at various times and on each occasion the defendant told Morton how disturbed Martin Epstein was because of the Playboy's persistence in conducting a program of soliciting



members by sending out mailings, and this same complaint was repeated to Morton by Morhouse. Thereafter Morton dealt directly with Martin Epstein in his New York Hospital room in July or August of 1962.

On cross examination Morton stated that he had known the defendant Ralph Berger for about twenty years, having originally met him as a customer in his father's Chicago restaurant. He stated he is not certain whether it was the defendant, or someone else, who introduced him originally to the attorney, Hyman Siegal.

He stated further that after his first meeting with Mr. Morhouse he was convinced that the Playboy would have to pay off if they hoped to get their liquor license in New York, and he also acknowledged that at no time during any of his conversations with Mr. Morhouse was there any mention of any payoff to Commissioner Epstein.

In this connection he acknowledged that when he testified before the Grand Jury on March 4th, 1962, that Mr. Morhouse did tell him that he was to deal with Commissioner Epstein and that he, Mr. Morhouse, had no part of that arrangement.

He admitted, further, that he and his associates feared that Mr. Epstein had the power to deny their application for a license, and he felt that they had to make this payoff to secure their license and to avoid losing their entire financial investment in New York.

He further stated that Mr. Morhouse made the arrangements for him to visit Mr. Epstein in the hospital. In that visit with Commissioner Epstein he stated that at no time was this defendant's name mentioned, nor was the question of any monies being passed discussed with him. The conversations were confined solely to the manner in which Playboy planned to operate its business in New York.

The witness also stated that he, as well as his fellow associates, felt that they were being victimized into making the payments to get their liquor license in New York.

The next witness was Robert Preuss. He is the Vice President and Business Manager of the Playboy Clubs and Playboy Magazine. He concerns himself with the general

supervision of the Playboy Clubs and their finances. He identified a check in the sum of \$274.23, dated November 29th, 1960, issued by Playboy Clubs to Ralph Berger.

He also identified a second check issued by Playboy Club to Lee Berco Co., Inc., in the sum of nine hundred and fifty dollars and dated December the 13th, 1960.

He recalled the meeting in his office with Mr. Morton and the defendant in May of 1961, at which time the defendant requested a payment, in addition to the five thousand dollars received by him, for expenses in connection with his various trips to New York.

On May 15th, 1961, the defendant submitted his bill for these expenses in the sum of \$1,516.83, and this bill was paid.

He recounted the events of his second meeting on June 27th, 1961, in his Chicago office, at which time the defendant submitted a bill to him for twelve thousand five hundred dollars, on the letterhead of Lee Berco Co., Inc., for services rendered.

It was not until February, 1962, that a second bill was given to him by the defendant on the stationery of Harry Steinman and a similar amount of twelve thousand five hundred dollars. These invoices as you know, were intended to cover the two checks heretofore given to the defendant by Morton, each check in the sum of twelve thousand five hundred dollars.

The defendant told Mr. Preuss that the proceeds of these checks, after taxes were deducted, were given in cash to [fol. 859] Commissioner Epstein. At the May, 1961 meeting the witness recalled that the defendant Berger mentioned the name of L. Judson Morhouse as the man who would see to it that Playboy received its liquor license.

He also recalled the events of a meeting among the executives, at which time there was discussed Mr. Morhouse's demands for assisting them in resolving their liquor license problem. At a subsequent meeting it was decided that Morhouse's demands for a one hundred thousand dollar stock option, and the right to operate gift shops in all of the

Playboy clubs throughout the country, would have to be rejected, but they did agree to retain him for twenty thousand dollars a year for a period of five years.

He recalled meeting Mr. Morhouse in June or July of 1961 in their Chicago office. Morhouse stated at this meeting, which was held together with Preuss and Lownes and Hefner, that he would resolve their liquor license problems and wanted an annual retainer of twenty thousand dollars, not with Playboy Clubs International, but with Playboy Magazine.

A bill for twenty thousand dollars was received by Playboy Magazine shortly thereafter, but Mr. Preuss made a part payment of ten thousand dollars on account of this retainer by check drawn by the Playboy Clubs International. Morhouse, however, returned this check and a check of Playboy Magazine in the same amount, that is, ten thousand dollars, was sent to Mr. Morhouse.

He recalls the August, 1961, meeting with the defendant and Mr. Morton in his Chicago office. The defendant then stated that he wanted to get a fee for himself, exclusive of the amounts to be paid to Commissioner Epstein. The defendant at that time stated that the Commissioner had told him that the case was much more difficult than he originally anticipated and that he, Commissioner Epstein, had retained all of the cash, after deduction of taxes, which [fol. 860] had been given to the defendant from the two checks totaling twenty-five thousand dollars.

The defendant was told that he would receive an additional fifteen thousand dollars for his services and a check for five thousand dollars on account was given to the defendant. The defendant delivered to the Playboy Clubs an invoice on the stationery of Lee Berco Co., Inc., for this amount, which invoice reflected the fact that it was for public relations services.

The witness testified to the fact that a series of airplane tickets were issued to the defendant in July and August and October of 1961, and that on each occasion in these trips the defendant was given expense money averaging about two hundred dollars.

He says that he next met the defendant on January 31, 1962, in his Chicago office, and that the defendant told him that Epstein was ill and needed money, and that it was now time for them to discuss the payment of the balance of twenty-five thousand dollars which was promised to Commissioner Epstein, as well as the balance of ten thousand dollars which was due to him.

A schedule of payments was agreed upon and the parties also agreed to whom these checks were to be made out. With respect to the twenty-five thousand dollar balance due to Mr. Epstein it was agreed that the following payments were to be made:

On February 5th, eight thousand dollars, to the order of Lee Berco Co., Inc.; on March 15th, a similar sum of eight thousand dollars was to be given, but the check was to be made to the order of Harry Steinman; and on April the 5th two checks, each in the sum of forty-five hundred dollars, one to Lee Berco Co., Inc., and the other to Harry Steinman, were to be given, thus making a total of twenty-five thousand dollars.

[fol. 861] However, while the other checks totaling sixteen thousand dollars, to which I have made reference, were in fact turned over to the defendant, the final payment, that is the nine thousand dollars embodying the two forty-five hundred dollars checks, were never given, or paid.

With respect to the ten thousand dollar balance allegedly due to the defendant, personally, these payments were to be made at three times: Three thousand dollars on February 12th, three thousand dollars on March 12th, and four thousand dollars on April 12th.

He testified further that on February 5th a check for eight thousand dollars was given to Lee Berco Co., Inc., and that on March 5th a similar sum of eight thousand dollars was given to Harry Steinman, and this total of sixteen thousand dollars, of course, you know, was the balance allegedly due on account of the twenty-five thousand dollars, the difference of nine thousand dollars never having been paid.

With respect to the balance of ten thousand dollars due to the defendant, the testimony given by Mr. Preuss was that on February 15th this defendant was given a check for three thousand dollars to the order of Lee Berco Co., Inc., and that on March 9th a similar check in the sum of three thousand dollars was made out directly to the defendant and given to him, leaving a balance of four thousand dollars. This balance of four thousand dollars was paid on August 16th by a check made out to the order of Lee Berco Co., Inc.

In 1962 Preuss requested invoices from the defendant covering the payments made by Playboy, and he received four invoices, each dated February 1st, 1962. Three of the invoices were on the stationery of Lee Berco Co., Inc., one for twelve thousand five hundred dollars, and two others were in the sum of ten thousand dollars each. The fourth bill was on the stationery of Harry Steinman and was in the sum of twelve thousand five hundred dollars.

[fol. 862] The witness stated that sometime in February, or March, of 1962, he had a telephone conversation with Morhouse, and the latter asked him for his second payment of ten thousand dollars, which was the balance of twenty thousand dollars due as a retainer for the year 1961—that would be the preceding year—and he suggested that a check in the sum of eight thousand dollars be made out to Layman Associates, Inc., his public relations firm, and that it be sent to him, and that the balance of two thousand dollars be retained by Playboy Clubs for payment to a Mr. Marrus, the attorney who was to file their liquor application.

A check for eight thousand dollars was made out to Lyman Associates and dated March 15th, 1962, and it was received in evidence.

The witness stated that all of the expenditures made were charged to the books of Playboy Clubs International, and Playboy Magazine, to either legal, promotional, or advertising expenses.



On cross examination he stated that in his testimony given before the Grand Jury he stated that the entries with respect to all of the payments made to Morhouse, or to the defendant, and his nominee, either for the defendant, himself, or purportedly for Mr. Epstein, were deliberately falsified in the books in order to conceal the true purpose of these payments.

He was questioned with respect to a meeting of the top executives of the Playboy Clubs held in Chicago after Mr. Morton had his first meeting with Morhouse in New York and Morton reported to the executives, including himself, that Morhouse told him that he would smooth out everything with Commissioner Epstein, and that the Playboy Clubs would receive their license, although he then felt that he and his associates of Playboy Clubs were victims of a shakedown and that they were trapped.

[fol. 863] He stated that he now knows that what they, in fact, did was to conspire to bribe a public official, that is Commissioner Epstein, so that they could get their license. However, he states that at the time that all of these negotiations were going on he did not actually intend to enter into this type of conspiracy. In this connection he acknowledged that the payments that were made to Mr. Morhouse were made because they feared that if they did not pay him as they agreed that they would not be able to open up their club in New York.

Lownes and Hefner had reported that Morhouse told them that Commissioner Epstein felt that Playboy Clubs manner of operating was illegal. The witness stated that although he and his associates felt to the contrary, nevertheless, he said that they were compelled to make the payments demanded in order to assure them the issuance of their license.

The witness felt that he and his associates believed that the Playboy Club in New York was legally entitled to receive this license in any event. Preuss testified with respect to the meeting held by the executives in Chicago in the summer of 1962, at which meeting Morhouse informed them



about his futile attempts to convince Epstein that their manner of operating was in conformance with New York law.

The next witness was Victor Lownes. In 1961 and 1962, he testified that he was the Vice President and Promotional Director of Playboy Clubs. In this capacity he picked out the club site in New York and he helped negotiate for its purchase. He recalls meeting Martin Epstein in his New York office with the then attorney for the Playboy Clubs, a Mr. Hyman Siegal, and this occurred, he said, in the early part of 1961. His associate, Mr. Hefner, was also present at this meeting.

[fol. 864] He explained to Mr. Epstein their manner of operating in Illinois and he told him that the Courts of that State had declared their operation legal. Their operation as you know, was one whereby they would operate a public club and make a one-time charge for a membership key and it gave the right to the Playboy Club to bar anyone from the club except those who were in possession of a membership key.

Mr. Epstein told him that the New York law did not permit this type of operation, and that he would either operate in the manner in which he suggested—that is, as a non-profit, private membership club, or not at all.

The witness said Mr. Hefner returned to Chicago and met with their other associates, where it was agreed that they abandon their plan to utilize the services of the defendant, Ralph Berger, and they also agreed that they would file their application for a regular R. L. license in New York and operate it in the manner which they felt was legal, that it operate their club in the manner in which they felt it was legal. Should such application be denied they would then resort to the Courts for relief.

At a later meeting, which took place in May of 1961, Mr. Morton told him that Berger was back in the picture, and was going to take them to Mr. Big in New York, who would see to it that the Playboy Club would get the type of liquor license that they wanted.

At a second meeting in Chicago with Morton some weeks later, at which Hefner and Preuss were present, Morton related the results of the meeting that he had with Morhouse in New York. He stated that Morhouse would represent them, for which he would receive twenty thousand dollars a year for a minimum of five years. Morhouse, additionally, wanted an option to purchase a hundred thousand dollars worth of Playboy stock when it was issued and Morton also stated that Morhouse said that his deal was separate from the arrangement that they had made to give Mr. Epstein fifty thousand dollars.

[fol. 865] The witness, Mr. Lownes, said that he told his associate that he ought to—to use his words—“Blow the whistle on the whole bunch”. However, he said that he agreed to go along with his associates with the payments to Commissioner Epstein and Mr. Morhouse, as planned.

In this connection he and Morton on a later date went to New York and met with Morhouse. He told Morhouse that they attempted to convince Commissioner Epstein of the legality of their operation but did not succeed and he said that he hoped that he, Mr. Morhouse, could talk to Commissioner Epstein, and convince him of the legality of their planned manner of operating in New York.

He recalls Morhouse saying that he would try to present it favorably to Commissioner Epstein, that he hoped he would be able to secure the regular R. I. liquor license. He said that there was some discussion with respect to Morhouse's desire for stock options. Mr. Morhouse agreed to abandon this request and suggested some alternative arrangement. He suggested that some alternative arrangement could be worked out to compensate him for the loss of the stock options.

On cross examination Lownes testified that on April 19th, 1963, he called a press conference in New York in which he stated that the Playboy Clubs were the innocent victims of corruption. He stated, further, in substance, at this conference that the Playboy Club was the victim

of the extortion and did not participate in the giving of any bribe to anyone.

He further stated that before the Grand Jury he said that the officers of Playboy Club did not want to pay Commissioner Epstein the fifty thousand dollars but felt that they had to make this payment if they were to secure this liquor license, even though they felt that they were legally entitled to receive this license.

[fol. 866] On re-direct examination he stated that he knew in 1961 that his dealings with the defendant Berger were illegal and when he testified before the Grand Jury he invoked his privilege against self-incrimination. It was only after he was granted immunity from prosecution for any crimes disclosed by his testimony that he answered any questions asked of him before the Grand Jury.

He further stated that he went along with Berger only because he felt that if he did not go along with Berger's demands the Playboy Club in New York would not get its liquor license and would thus lose whatever investment they had, and the opportunity of opening up a Playboy Club in New York.

The next witness was Frank Jacklone. He testified that he is the principal owner of a club known as The Tenement, and that it is located at 1046 Second Avenue. He described the premises to you in some detail, and he related his financial investment therein in order to prepare for the operation of a night club and restaurant.

In the latter part of 1961 he applied for his liquor license, with his then business associate, one Maurice Pollack, but later withdrew his application. In March of 1962 he refiled his application as the sole principal of the club.

He stated that he knows Harry Steinman and that in May of 1962 he was in Steinman's office at 15 East 48th Street. He said that at that time he spoke to the defendant over the phone from Steinman's office about his then pending liquor license. The defendant is then alleged to have told him that he was aware of the problems that he

was having in getting his license, and that he, Ralph Berger, would be in New York shortly thereafter, and that the witness, Frank Jacklone, should not worry about it.

He recalled meeting the defendant, in person, in Kenny's Steak Pub sometime later, that is, in June. Harry Stein-[fol. 867] man was present at this meeting. The witness told the defendant that he could not understand why his liquor license was being held up because he felt he was legally entitled to it.

Thereupon, the defendant told him that he had spoken to Commissioner Epstein and that it would cost the witness, Frank Jacklone, ten thousand dollars to get his license.

The defendant is further alleged to have said that this entire sum was to go to Commissioner Epstein, except for his own expenses, which were to be deducted. The witness told the defendant that he would raise this money and pay it the day that he got his license.

He further recalled that when he spoke to Mr. Steinman in the latter's office in May, Steinman made an appointment to meet with a Nat Roth, so that they could secure all other papers that Roth had in connection with the liquor application, which papers were to be turned over to a new attorney, one Harry Neyer, who, you will recall, in the testimony, there was some evidence to the effect that Nat Roth was the original lawyer who represented Frank Jacklone on his application for a liquor license.

He further recalled that shortly after this meeting Harry Steinman brought him to attorney Harry Neyer, and that Neyer was retained to handle the then pending application of the Tenement for a liquor license.

He testified that he received his liquor license on June 28th, 1962, after first being required to sign an affidavit that he would not hire one Wynn Lassner in any capacity.

He first learned of the approval of his application when Mr. Steinman phoned him and told him of this favorable

action. Harry Neyer accompanied him that day to the State Liquor Authority, and he received his license.

[fol. 868] He then phoned Harry Steinman and told him that there was some confusion about securing the money that was due that day but that he would have it the following day. His testimony was, also, to the effect that he had previously given Harry Steinman \$2,500, so that there was only due at that point the sum of \$7,500.

Steinman told him that he was annoyed with the fact that he did not have the money on him that day, as promised, and that he should speak to Ralph Berger, the defendant, who was then in the office.

The defendant also told the witness that he was disturbed by the fact that the balance of \$7,500 was not forthcoming, as promised, and he was alleged to have said, in substance, that the witness might think he was all set because he had his license, but that he could lose it the same way he got it.

On the morning of June 29th, that is, the following day, Jacklone testified that he borrowed seventy-five hundred dollars and he took it to the office of Harry Steinman. Berger was present at the time, and he handed this money to the defendant, who counted it out in his presence.

Steinman asked him to make out a check for the attorney, Harry Neyer, in the sum of \$250. He stated that Neyer originally wanted two thousand dollars for his services but that he, Harry Steinman, was able to bargain him down to \$750. The difference of five hundred dollars Steinman said he would lay out in cash for Frank Jacklone, and Jacklone is alleged to have said that he would return this five hundred dollars to him, that is, Harry Steinman, the following Monday.

On cross examination, Jacklone admitted that after he secured his license and opened up his club he did, in fact, hire Wynn Lassner in some capacity, despite the representation that he made to the State Liquor Authority that he would not do so.

[fol. 869] He further stated that he always felt that he was entitled by law to his liquor license. He admitted that



he was convicted of a gambling charge in 1951 in Virginia Beach, while he was serving in the Navy.

He repeated that, when he brought this seventy-five hundred dollars to Steinman's office on the morning of June 29th and turned it over to the defendant, the latter counted the money. However, he said that before the grand jury he stated that he handed the money to the defendant but that the defendant did not count it. This statement he said was not the truth.

He was questioned with respect to the payment of the twenty-five hundred dollars, and in this connection he testified that he had given this sum to Harry Steinman. But before the grand jury he had stated that he had given the sum of twenty-five hundred dollars to the defendant about a week before he gave him the balance of seventy-five hundred dollars.

He was also questioned, on cross examination, about the conversation he had with Steinman with respect to the payment of five hundred dollars in cash over and above the check for \$250 which was made out to Harry Neyer and which was to cover the fee of \$750, purportedly due to Mr. Neyer.

In his testimony on direct examination he said that this conversation took place in Steinman's office, but before the grand jury he said that the conversation about the five hundred dollars in cash to be given to Harry Neyer took place not in Steinman's office but in his club.

On re-direct examination, it was brought out that on a subsequent appearance of the witness before the grand jury he admitted that he had not told the truth on his first appearance, for the reason that Harry Steinman had spoken to him and asked him to keep his name and his office out of the picture as much as possible. In other [fol. 870] words, he said that he lied in order to help Harry Steinman by minimizing the role that Steinman played in this picture. The fact in truth is, he says, that he did give the first payment of twenty-five hundred dollars to Harry Steinman shortly before June 27th, and that when



he brought the balance of seventy-five hundred dollars to Steinman's office, on the morning of June 29th, he turned it over to the defendant, and that the latter did count it out in his presence, and that the conversation with respect to the \$750 to be given to the attorney, Harry Neyer, was had in Steinman's office that same morning and not in his club.

\*     \*     \*     \*     \*

[fol. 871] The Court: (Continuing charge) Continuing now, members of the jury, with the testimony, the next witness called was Detective Anthony J. Bernhart. He is assigned to the District Attorney's office, and in June of 1962 was working on the State Liquor Authority investigation.

On June 25th, at about 6:30 P. M., he and a brother officer, a Detective Campbell, went to the New York Hospital on East 68th Street. They stationed themselves outside the open door of Room 1619, which was the hospital room of Martin Epstein. Some time around the hour of 8:10 P. M. he saw the defendant enter Mr. Epstein's room. There were other persons in the room at the time, and he saw the defendant stand at the bedside of Mr. Epstein and engage him in conversation for about twenty minutes. The other persons in the room stood off to the side while this conversation took place. The defendant was seen to leave the hospital some time around nine o'clock, and the witness followed him to Kenny's Steak Pub, located on Lexington Avenue and 53rd Street. There he saw the defendant and Harry Steinman seated at a table and they ordered food. He and his brother officer took a table next to them. Shortly before eleven o'clock that night the witness Frank Jacklone came in with a female and sat down with the defendant and Steinman. He was able to hear Jacklone introduce the lady he was with, saying at the same time that they could talk freely because he, Frank Jacklone, and this lady were like "brother and sister."

[fol. 872] The only conversation he heard pertaining to this case was a statement made by Frank Jacklone to the defendant and Steinman, wherein Jacklone said that he did not know why they were throwing rocks at him down there because everything was all right, to which the defendant, allegedly, replied, in substance, "Don't worry. Everything will be all right. I just spoke to him."

On cross examination, he stated that he was unable to hear any of the conversations which took place between the defendant and Mr. Epstein at the latter's bedside.

Jacklone was recalled, and he said that he remembered some additional conversation that he and Mr. Berger had in Kenny's Steak Pub on the late evening of June 25th, 1962. The defendant then is alleged to have said that he was also handling the Playboy liquor license matter and that it was costing Playboy much more than he was paying.

Detective Walter Finley testified that on June 27th, 1962, he was outside the New York Hospital and that during his surveillance he observed the defendant make a phone call inside the hospital, and he overheard him say to someone that he had called downtown at a quarter to five and that the approval was in.

He says that he observed the defendant leave the hospital some time around the hour of six o'clock. Again on June 29th, while stationed outside the New York Hospital, he saw the defendant leave the hospital just shortly before four o'clock in the afternoon. It was on this afternoon that he described the defendant's activities on leaving the hospital, stating that the defendant's movements were photographed with a movie camera. The movie film taken by the witness was shown to you in the courtroom.

The next witness was Detective James A. Poulos. He testified that on June 27th, 1962 he observed this defendant [fol. 873] on the sixteenth floor of the New York Hospital. He saw him enter the room of Martin Epstein, where he remained for about five minutes and emerged later with Mrs. Epstein.

The defendant left the hospital some time around six o'clock that evening. He also was on the sixteenth floor of the hospital on the afternoon of June 29th (that would be two days later) when he observed this defendant get off the elevator on the sixteenth floor. He saw him enter Mr. Epstein's room.

He further stated that during the time that he was in this room he saw Berger come out of the room, look up and down the corridor, and then reenter the room. He then saw him leave shortly thereafter. He and the defendant Berger went down the elevator together, and he saw the defendant leave the building.

The next witness was George Kelly. He is an attorney-at-law and practices in the City of Chicago, Illinois, and he is counsel to the Michigan Avenue National Bank of Chicago. He brought to this court and identified certain records of a depositor, Lee Berco Co., Inc. He identified, firstly, a deposit slip of Lee Berco Co., Inc. for a check in the sum of \$12,500, issued to that depositor and endorsed by that company and cleared by that bank on June 30th, 1961. This deposit slip was dated June 29, 1961. And he also identified a check for \$12,500, issued by Playboys Clubs International, which he had already testified was the check which had been cleared on June 30th, 1961.

He identified a second deposit slip dated February 16th, 1962, made out by the same depositor, Lee Berco Co., Inc., showing a deposit of a check for three thousand dollars. He also identified a check in this amount, which was validated and cleared by the bank on February 19th, 1962. This check was issued by Playboy Clubs International on February 15, 1962 and made out to the order of Lee Berco Co., Inc.

[fol. 874] He identified a third deposit slip of Lee Berco Co., Inc., dated August 16, 1962, showing a deposit of a check in the sum of four thousand dollars. A check in this amount was identified by the witness as having been cleared and validated by the bank in that month.

Timothy Dempsey testified that he is a general clerk employed by the Chase Manhattan Bank. He identified a check, dated June 28th, 1961, issued by Playboy Clubs International for \$12,500, to the order of Harry Steinman, which was cashed at a branch of the Chase Manhattan Bank on 28th Street, in New York County.

The next witness was Detective Henry Kronin. He is attached to the District Attorney's Office Squad, and on June 29th, 1962, at about ten o'clock in the morning, he had the office building of 580 Fifth Avenue under observation. It was in this building that attorney Nat Roth had his offices. At about 10:15 that morning he observed Frank Jacklone outside the building, and shortly thereafter he observed Nat Roth come out of the building and engage Jacklone in conversation. On December 10th, 1962 he was in Chicago, where he saw this defendant in the hallway of an office building, and he spoke to him.

There came a time when he observed this defendant tear up and discard some paper. He later retrieved this paper from the area where it was discarded, and he matched up the papers and preserved them. He thereafter placed them between two pieces of glass. This evidence, consisting of three business cards, was received and read to you.

Detective William F. Reilly testified that on May 28th, 1962, at about 4:30 in the afternoon, he had a building located at 22 West 48th Street under observation. He says that at about 4:30 that afternoon he saw three males leave the building, and he identified them as Frank Jacklone, Harry Steinman and one Tony Pucci. They separated. He heard Harry Steinman speak to one of the others.

[fol. 875] On June 27th, 1962 he was in the vicinity of the New York Hospital, and around five o'clock that afternoon he observed the defendant outside of the hospital. Later, at about 6:10 in the evening, while in the lobby, he saw the defendant make several phone calls, during which he was able to overhear the defendant's voice.

On June 29th, 1962 he again went to New York Hospital, and at about 2:30 in the afternoon he saw the defendant enter Room 1619, the hospital room of Martin Epstein. On the day before, June 28th, 1962, he states that he overheard a conversation emanating from the office of Harry Steinman, and he states that he made certain tape recordings of these conversations.

Prior to that date, an electronic eavesdropping device had been planted in Mr. Steinman's office. He recognized the voices as those of Harry Steinman and this defendant, Ralph Berger, and he recounted some of the conversation that he overheard.

He recalls hearing a second conversation that day, at about five o'clock in the afternoon. It was the voices of the same two persons, Harry Steinman and Ralph Berger. In substance, he stated that he heard the defendant ask Steinman, "Where is he, Harry? He was supposed to be here several hours ago. Where is this good fellow that's supposed to appreciate favors?"

To this, Harry Steinman is alleged to have replied, "He'll be here. He'll be here, Ralph. Don't worry about it. He'll be here."

He said he then heard the defendant Berger say, in substance, "This should be worth fifteen thousand dollars, Harry. If Nat Roth can get ten, this should be worth at least fifteen thousand dollars."

The next witness was Detective Boleslaw Baransky. He testified that on June 26th, 1962 he installed an electronic recording device in Room 801, the office of Harry Steinman, located at 15 East 48th Street. This device was in the form of a small microphone and was connected to some [fol. 876] unused telephone wires in that room. These wires were connected to a magnetic tape recorder which had been set up in what the officers have referred to as a "plant" and which was located in the basement of a nearby building. Before doing this, he says that he tested this equipment and he stated that it was capable of reproducing sound.



Patrolman Reilly was recalled and he testified that he was stationed at this plant and that he recorded the telephone conversation which took place in the office of Harry Steinman on the afternoon of June 28th, 1962.

On cross examination, he acknowledged that on this recording there were many words completely inaudible and there were also many gaps in the conversation.

Detective Sidney Berkowitz testified that on June 29th, 1962 he was assigned to monitor the eavesdropping device which had been placed in Harry Steinman's office, in his room, at 15 East 48th Street. He states that at 10:15 on the morning of that day he heard three voices engaged in a conversation. He was able only to identify the voice of Harry Steinman as one of the three persons. He made a typewritten transcript of what he heard on the recording machine. He stated that in order to complete this transcript it was necessary for him to play the entire recording, or parts of it, repeatedly.

He further states that he made a comparison between the transcript and the tape recording and he states that the transcript represents a true and accurate typewritten statement of what is contained in the recording.

On cross examination, he testified that there were many places in the recording which he characterized as "inaudible" and there were other places in the conversation in which he heard nothing. These places he characterized as "gaps" in the conversation.

Patrolman Reilly was again recalled, and he stated that he played the reel which purportedly recorded the conversation which took place on June 28th. He recognized [fol. 877] the voices of Steinman and Berger on this recording, and he related to you the manner in which he prepared a typewritten transcript of what he says is contained on this recording. He compared this transcript with the tape, and he states that the transcript is an accurate typewritten transcript of the conversations contained in the recording which purportedly took place between Ralph Berger and Harry Steinman, in the office of Steinman on the early afternoon of June 28th, 1962.



At this point Detective Kronin was recalled. He is the officer who, you will recall, spoke to the defendant Ralph Berger in Chicago on December 10th, 1962. He stated that two days later, on December 12th, 1962, he listened to the tape recording of the conversations of June 28th and June 29th, and he stated that he recognized the voice of the defendant, Ralph Berger, as one of the persons engaged in such conversations. On at least two occasions thereafter, during the course of this trial, he again heard the tape recordings of both these conversations, and again stated that he recognized the voice of this defendant as one of the persons engaged in the conversation.

He additionally stated that on these two occasions he had with him the two transcripts on each of which appears a notation with respect to the names of the persons who allegedly spoke and whose voices were recorded on the reel in question. He states that the voice of this defendant is accurately indicated on each transcript where his name or initials appear thereon.

The next witness was James J. Mahoney. He is the supervising investigator employed by the District Attorney's office and is in charge of preserving the records relating to all of the tape recordings kept in the District Attorney's office.

He related at some length the place where these records are kept and the procedural operations of the District Attorney's office, of which he is in charge, whenever a reel is requested by someone in authority to receive it.

In the present case he says his records reveal that on June 18th, 1962 he turned over a blank reel to Detective Bernhart and that before doing so he placed upon this reel certain identifying marks. That reel, which he identified, was the same one that was returned to him on July 2nd, 1962. Since that date he states that he kept a record of each instance that the reel was taken from his custody and when it was returned to him.

At this point the District Attorney called as witnesses all of the detectives who at one time or another, since July 2nd, 1962, removed this reel, which has been identified as Reel No. 5483, from the District Attorney's office, for one reason or another, and each detective testified, in substance, that while such reel was in his possession and under his control it was at no time altered or deleted in any fashion, nor were any changes or additions made thereto.

Frank Jacklone was recalled at this point, and he testified that on several occasions he listened to a playback of Reel 5483. He recognized the three voices of the persons who purportedly engaged in a conversation on the morning of June 29th. One was his own, and the others were those of Harry Steinman and the defendant, Ralph Berger.

He further stated that this conversation was the same one which he related, in substance, on his direct examination.

Arnold Morton was recalled, and he stated that before he testified before the grand jury he invoked his privilege against self-incrimination and refused to answer questions until the grand jury had voted to give him immunity. This means that he could not be indicted for any crime revealed by his testimony.

He was specifically asked whether or not during his period of activities with this defendant he had anything [fol. 879] to fear from him, and he said that he did not, and that no threat of any kind was made to him by this defendant.

Hyman Amsel testified that he's counsel to the State Liquor Authority, and you will recall that when he attempted to relate the functions and duties of the Chairman of the Commissioners of the State Liquor Authority, counsel for the defense asked this Court to take judicial notice of those duties and functions as revealed and set forth in the Alcohol Beverage Control Law, and I granted his application.

The witness, additionally, stated that during the period of time in question the State Liquor Authority had formulated a policy to the effect that it would not issue a license to sell liquor to anyone on a basis whereby the general public would be excluded and entrance to the premises restricted to persons who became members of the licensee by purchasing a key, or in any other comparable manner.

He additionally stated that the Playboy Club had been finally granted a liquor license on certain conditions, amongst which was that the general public would be permitted to enter the premises and be served. The Playboy Club, however, secured relief in the courts, wherein it was determined that their mode of operation, limiting persons permitted on the premises to key holders, was declared to be legal.

The next witness was Detective David F. Campbell, who testified that on June 29th, 1962 he placed under observation premises 15 East 48th Street, the building in which Harry Steinman has his office. He recalls that around 11:40 in the morning the defendant and Harry Steinman emerged from the building. They returned to the premises not too long afterwards, and he saw the defendant emerge alone sometime around the hour of two o'clock in the afternoon.

[fol. 880] At this point the People introduced into evidence the recording of Reel No. 5483, which purported to be a record of the conversations which took place in the office of Harry Steinman on the early afternoon of June 28th, 1962 and the early morning of June 29th, 1962.

The People also offered in evidence the two transcripts purporting to be accurate transcripts of these conversations, and they were received in evidence, as you know, but for the limited purposes related by the Court during the trial, and I will again relate in my charge the limited purposes for which these transcripts were permitted to be used.

The last witness was Samuel Lachter. He is the chief accountant attached to the District Attorney's office. He

had served a subpoena on the Berco Co. Inc. requiring the production of certain checks and other papers. He identified one check produced by that corporation as a result of the service of such subpoena. This check was received in evidence. It was dated June 29th 1961, and it is made out to the order of R. Berger, and is in the sum of nine thousand dollars. It was signed by Lee Berco Co., Inc. by R. Berger, and the check reveals it was cashed on the same date that it was issued.

At this point the People rested its case, and thereafter both sides rested. Now, members of the jury, I have recounted to you my recollection of the testimony given by the respective witnesses who testified during this trial. I pass this resume on to you with this admonition; that should you find that I have been in error in my recollection of the testimony, disregard what I have said and rely upon what you believe and recall the witnesses said. The fact that I may have omitted something which a witness testified to and which in your minds is important is not any indication that you should disregard such testimony. On the contrary, you are to consider all of the testimony which you feel has any relevant bearing on any of the issues in this case. If in your deliberations you desire [fol. 881] all or part of a witness's testimony read back, notify the court officer, and you will be brought back to the courtroom, and the reporter will comply with your request.

I charge you further that whenever you can reconcile, consistently, conflicting testimony, it is your duty to do so, because human experience has taught all of us that persons seeing the same event at the same time may not be able to recall it and describe it in exactly the same manner. That is the reason for this rule of law. But where you find any conflict of the testimony that you cannot reconcile, do not hesitate to cast aside that which you deem exaggerated, incorrect, or wilfully perverted, and accept that which you believe to be correct and truthful.

Now, members of the jury, this brings us down to the third and last part of the charge, wherein we will examine

the indictment, and I will relate the law applicable to the two counts of crime charged therein, each count charging the defendant with the misdemeanor of conspiracy. I will read these counts to you in the order in which evidence with respect to each was presented.

The second count in the indictment which I will refer to as the Playboy Club count charges this defendant with the crime of conspiracy in the following language: And the grand jury aforesaid by this indictment further accuse the defendant of the crime of conspiracy in violation of Section 580 of the Penal Law, committed as follows: The defendant Ralph Berger, Harry Steinman, Arnold Morton and divers other persons (said defendant and said named conspirators and said divers other persons being hereinafter called the conspirators) in the County of New York from on or about July of 1960 continuously up to on or about December 7th of 1962 did knowingly, wilfully, wrongfully, unlawfully and corruptly conspire with each other to commit crimes in violation of Section 378 of the Penal Law, in that the conspirators knowingly, wilfully, wrongfully, unlawfully and corruptly did agree to give, offer [fol. 882] and cause to be given and offered a bribe, particularly a sum of money to a public officer attached to the New York State Liquor Authority, with intent to influence him in respect to any act, decision, vote or opinion and other proceeding in the exercise of the powers and functions which he had or might have had relating to the issuance of a license by the New York State Liquor Authority to sell liquor at the Playboy Club located at 5 East 59th Street, New York County.

During the Fall of 1960 the corporation Playboy Clubs of New York, Inc. was formed, the stock of which was wholly owned by the parent corporation Playboy Clubs International, Inc. During the period of said conspiracy and for sometime before, Arnold Morton was vice-president and operational director of Playboy Clubs International, Inc. which was planning to establish a Playboy Club in New York County, and was attempting to secure a license to sell liquor in said club.



As part of said conspiracy the defendant Ralph Berger agreed with Arnold Morton, other officers of Playboy Clubs International, Inc. and certain persons, to give to said public officer attached to The New York State Liquor Authority the sum of \$50,000 in order to secure a license to sell liquor at the Playboy Club in New York County. It was the plan of the conspirators that the Playboy Club International, Inc. would deliver the said sum of \$50,000 to the defendant Ralph Berger and his co-conspirator Harry Steinman. It was further agreed that the defendant Ralph Berger would pay the said sum of \$50,000 to the said public officer for the issuance of the license to sell liquor at the Playboy Club in New York County.

The indictment then goes on to recite the commission of twenty-seven overt acts alleged to have been committed by the parties to the conspiracy in furtherance of its object and purpose. I will, later in my charge, read those twenty-[fol. 883] seven overt acts to you and I will give you a definition of what constitutes an overt act, and I will also relate its legal import in your consideration of the crime of conspiracy as charged against the defendant.

The first count in the indictment which I will refer to is the Tenement count which charges the defendant with the crime of conspiracy in the following language: The grand jury of the county of New York by this indictment accuse the defendant of the crime of conspiracy in violation of Section 580 of the Penal Law committed as follows: the said Ralph Berger, Harry Steinman and Frank Jacklone and divers other persons (said defendant and said named conspirators and said divers other persons being hereinafter called the conspirators), in the county of New York from on or about the end of May 1962 continuously up to on or about June 29th, 1962, did knowingly, wilfully, wrongfully, unlawfully, and corruptly conspire with each other to commit crimes, in violation of Section 378 of the Penal Law, in that the conspirators knowingly, wilfully, wrongfully, unlawfully, and corruptly did agree to give, offer and cause to be given and offered a bribe, particularly a sum of money



# MICROCARD

TRADE MARK 



**MICROCARD<sup>®</sup>  
EDITIONS, INC.**

PUBLISHERS OF ORIGINAL AND REPRINT MATERIALS ON MICROCARDS  
901 TWENTY-SIXTH STREET, N.W., WASHINGTON 7, D. C. FEDERAL 3-6393

  
**microcard**

# CARD 11

to a public officer attached to the New York State Liquor Authority, with intent to influence him in respect to any act, decision, vote, opinion and other proceedings in the exercise of the powers and functions which he had or might have had relating to the issuance of a liquor license by the New York State Liquor Authority, to sell liquor at a supper club known as the Tenement.

During the period of the conspiracy and for about a year before, Frank Jacklone the proprietor of a supper club known as the Tenement, was attempting to secure a license to sell liquor at said club, from the New York State Liquor Authority. As part of said conspiracy Frank Jacklone agreed with the defendant Ralph Berger and co-[fol. 884] conspirator Harry Steinman to give to said public officer the sum of Ten thousand dollars to secure a license, to sell liquor at the Tenement.

It was the plan of the conspirators that Frank Jacklone would deliver the said sum of Ten thousand dollars to defendant Ralph Berger and his co-conspirator Harry Steinman. It was further agreed that the defendant Ralph Berger would pay the sum of Ten thousand dollars to the said public officer upon the issuance of a license to sell liquor at the Tenement.

Here again the indictment recites twelve separate overt acts which the People allege were committed by the parties to the conspiracy to further its object and purpose.

As I have already indicated, I will charge you in detail with respect to this ingredient of the crime charged. Section 580 of our Penal Law defines the crime of conspiracy, and it makes it a misdemeanor for two or more persons to conspire to commit a crime. Before defining the essential elements of the crime of conspiracy, let us first understand the crime which the People contend was the purpose and object of this conspiracy, that is, the crime of bribery of a public officer.

Section 379 of our Penal Law makes it a crime to give or offer, cause to be given or cause to be offered a bribe

of any money to a public officer or a person executing any of the functions of a public officer with intent to influence him in respect to any act, decision, vote or opinion in the exercise of the powers or functions which such person has or may have.

A bribe is the giving or offering to give of money or anything else of value to a public officer with the intent to influence him in respect to any act, decision, vote or opinion in the exercise of the powers or functions which he possesses.

[fol. 885] To constitute a bribe the money or property must be given or offered voluntarily, free of force or fear induced by a threat by the public official to do an unlawful injury to the property or person of the bribe giver, under color of official right.

I charge you as a matter of law that Commissioner Epstein during the period of time covered by the indictment was a public officer, within the purview of the statute which defines the crime of bribery of a public officer. In his capacity as a Commissioner of the State Liquor Authority and as Chairman of the Board of Commissioners he was empowered to act, to cast a vote, and to express an opinion with respect to any application for a license to sell liquor anywhere in The State of New York.

Now, having given you some insight into the nature of the crime which the People allege was the purpose and object of the conspiracy, let us now direct our attention to the legal ingredients, the elements of the crimes charged, that is, the crime of conspiracy.

As I have already stated Section #580 of the Penal Law makes it a misdemeanor for two or more persons to conspire to commit a crime. The gravamen, the gist of the crime of conspiracy is an unlawful agreement to commit a crime, and not in the successful execution of the plan. The crime is complete upon proof of the unlawful agreement and of the commission of a single overt act done to effect the object thereof by any one of the parties to the agreement. Therefore it should be crystal clear to you that

the crime of conspiracy is separate and distinct from the crime which is the purpose and object of the conspiracy which the People alleged is the crime of bribery of a public official.

Therefore, conspiracy being a crime separate and distinct from its criminal object, there is no obligation on the part of the People to establish that Martin Epstein or [fol. 886] any other public officer ever in fact did receive any of the moneys allegedly paid by the Playboy Club or the Tenement to this defendant.

Let us now direct our attention to the essential elements of the crime of conspiracy. To sustain either count in the indictment the People must establish the following elements of the crime to your satisfaction and beyond a reasonable doubt: First, that the defendant and one or more of the others named in the testimony and claimed by the People to be conspirators, conspired, that is, agreed to commit a crime. Second: that this defendant and any one of his alleged conspirators were possessed of a criminal intent to commit a crime. And, third: that this defendant or any one of his co-conspirators performed at least one of the overt acts charged in the indictment in furtherance of the objects purpose of the conspiracy.

Let us separately examine each of these three essential ingredients of the crime of conspiracy: First, it must be established that this defendant conspired with one of the other persons alleged to have been his conspirator to commit a crime. Basically, a criminal conspiracy is an agreement entered into by two or more persons to commit a crime. Unless you find that the defendant entered into an agreement with at least one other person to commit a crime, then he cannot be found guilty of the crime of conspiracy. This is for the very simple reason that a person cannot conspire with himself. He must have at least one person in the criminal enterprise. Before there can be a conspiracy, there must be an agreement expressed or implied with a common corrupt intent in the mind of two or

more persons to accomplish an illegal object that is a crime. Good common sense would appear to dictate that persons engaged in a criminal conspiracy do not consult lawyers for the purpose of formalizing their corrupt agreement. [fol. 887] Our law recognizing this fact, permits proof of the agreement to be established either by direct proof or by inference as a deduction from the acts or conduct of the conspirators which discloses a common design to act together to commit a crime.

In the instant case it would appear that the People have relied upon both direct proof and inferential proof to establish the existence of such an agreement. Inferential proof is commonly referred to in our law as circumstantial evidence.

I will now define to you what constitutes direct and circumstantial evidence, and the rule applicable to direct and circumstantial evidence. Direct evidence means what the words imply, it is evidence given by persons as to what they actually did or what they actually saw or what they actually heard.

By circumstantial evidence is meant proof facts and circumstances by witnesses who have testified to things seen or heard from which inference can be drawn as to the ultimate fact in issue. It consists of a chain of circumstances so woven link by link, each linked into another, as to lead from the proof of things seen and known, one by one down to the establishment of the unknown and unseen fact, the ultimate fact in issue.

In attempting to prove a fact by circumstantial evidence, there are certain rules to be observed, that reason and experience have found essential to the discovery of proof and to the protection of the innocent. The circumstances themselves must be established by direct proof and not left to rest upon inference. The inferences which is to be based upon the facts and circumstances so proved, must be clear and strong in logic, with an open and visual connection with the facts found in the proposition to be proved.



In determining the question of fact from circumstantial evidence, the hypothesis of guilt should flow naturally from [fol. 888] the facts proven and be consistent with them all, and the evidence must be such as to exclude to a moral certainty every hypothesis but that of guilt.

If the circumstantial evidence is susceptible of two constructions, that is one pointing to guilt, and the other pointing to innocence, the construction more favorable to the defendant, that of innocence, must be adopted. But if the circumstantial evidence points in one direction only, namely the inference against the defendant, that is, the inference of guilt, then you are bound as jurors to regard that evidence as controlling and be guided accordingly. In considering circumstantial evidence, the jury must not base inference upon inference, but only upon a fact.

Now, it services no useful purpose to indulge in any observation as to which form of evidence is more convincing. If evidence in a given case be so convincing as to necessarily prove a defendant's guilt to a moral certainty, that is, beyond a reasonable doubt, it is of little moment by what kind of proof that result is produced. If you are so convinced, a verdict is proper whether you are so convinced by direct evidence, by circumstantial evidence, or by a combination of both types of evidence. All that you should be concerned with is whether the evidence in this case satisfies your minds of the guilt of this defendant beyond a reasonable doubt.

Under our law any witness who is a partner of the defendant in the conspiracy to commit the crime of bribery of a public officer is deemed to be a principal in the commission of that crime and an accomplice of the defendant. Such person is one who in any degree whatsoever aided or abetted this defendant in the commission of this crime, or directly or indirectly counseled, induced or procured this defendant to commit the crime. Stated simply, an accomplice of the defendant is a partner of the defendant in the commission of the criminal conspiracy.



[fol. 889] On the present state of the record with respect to the Playboy Club count I charge you that the witnesses Arnold Morton, Robert Preuss and Victor Lownes, if believed are co-conspirators and accomplices of this defendant as a matter of law. So also with respect to the Tenement Club count, the first count. I charge you that as a matter of law Frank Jacklone if he is to be believed is a co-conspirator, and therefore an accomplice of this defendant.

We have a Section of our law which states that a conviction of a defendant cannot be had upon the testimony of an accomplice unless the accomplice be corroborated by such other evidence as tends to connect the defendant with the commission of the crime with which he is charged. Such corroborative evidence as the law requires must be more than such evidence as merely raises a suspicion as to the guilt of a defendant. However, it is not necessary that the corroborative evidence should of itself be sufficient to establish the commission of the crime. It is sufficient if such evidence merely tends to connect this defendant with the commission of the crimes with which he is charged and thus furnish a reasonable ground for a finding by you that the accomplice was telling the truth.

Under our law when two or more persons enter into a conspiracy to commit a crime, then any act done or any declaration made by any conspirator during the period of the conspiracy to further its purpose and object, becomes in law the acts or declaration of all of the parties to the conspiracy. So that if you find that this defendant Ralph Berger criminally conspired with one or more persons in the perpetration of the crimes charged in the indictment, then the acts done or the declarations made by any one of the co-conspirators of this defendant in furtherance of the objects and purpose of the conspiracy and during its operation, are binding on this defendant, and such acts [fol. 890] or declarations may be considered by you as evidence in resolving the defendant's guilt or innocence

of the crimes with which he is charged. Such legal responsibility for the acts and declarations of his co-conspirators attaches to the defendant regardless of whether he was present or absent when such act was done or declaration made, and, regardless of whether the defendant knew or was ignorant of the doing of such act or the making of such declaration by his fellow conspirator or conspirators.

Now let us direct our attention to the second element of this crime, that is, that the defendant and his co-conspirator or conspirators were actuated by and were possessed of a criminal intent, for even if you find that this defendant entered into an agreement with one or more of the co-conspirators to bribe a public official, yet he cannot be found guilty unless he and at least one other co-conspirator were possessed of a criminal intent; or if he and his co-conspirators acted through some form of misconception or through ignorance or without any corrupt motive, then this defendant cannot be found guilty of any crime.

Now, you may ask yourselves how do you go about resolving an issue which involves the probing of one's mind; because intent is basically a subjective element, it is a state of mind. Its existence may generally be discerned by what one sees or does at a particular time. In ascertaining the existence of this element of the crime of conspiracy, you have the right to and you should examine all of the conduct and declarations of the defendant and his co-conspirators during the period of the conspiracy.

Now, let me charge you with respect to the testimony of those two co-conspirators of this defendant who disclaimed any intent on their part to engage in a conspiracy to bribe a public officer. Such an oral disavowal of an intent [fol. 891] to violate our laws while constituting evidence which you should consider in resolving this issue, nevertheless it does not irrevocably bind you. Their statements that they neither considered themselves a part of a conspiracy to bribe to public officer must also be examined

in the light of what each believed constituted the crime of bribery. And in this connection you will recall each stated that the reason he felt that way was because he was paying to secure that which he considered he was legally entitled to receive. Nevertheless I charge you that the law is to the contrary, the crime of bribery of a public official may be committed if the bribe offered or given to the public officer was for the purpose of influencing him with respect to a decision, vote or opinion which he was empowered to make by virtue of his public office, even with respect to any application for a liquor license which the giver of the bribe was legally entitled to receive. This testimony, however, should be considered by you together with all of the other relevant evidence in determining whether these two witnesses entered into a conspiracy with this defendant motivated by a criminal intent.

Our law goes further; as I have already suggested, a person's intent may be discerned from an examination of all of his conduct, and statements made by him, during the conspiracy.

Under our law one is deemed to intend that which is the normal or the natural, or the inevitable consequences of his own voluntary acts, if, in fact, he did anything. For example, ask yourselves this question: When Frank Jacklone paid ten thousand dollars to Steinman, and the defendant Ralph Berger, was he then aware of the purpose for which such cash was being given?

[fol. 892] Was there in existence at that time a mutual understanding between Jacklone and this defendant that this money was to be given to the defendant for the purpose and object of having him deliver all, or any part of it, to Martin Epstein for having granted to The Tenement a liquor license?

The answer to this question, together with any other credible evidence on this factor should resolve the issue as to whether Frank Jacklone and this defendant were aware of the fact that the object of their conspiracy, if one

in fact existed, was corrupt and wrongful, and whether both of them were possessed of the requisite criminal intent.

So also with respect to the Playboy Club count. Examine all of the conduct and declarations of this defendant, and his alleged co-conspirators, made during the period of the conspiracy and any other testimony given as evidence which you feel has any bearing on this issue as to whether the defendant and any one or more of his co-conspirators were possessed of the requisite corrupt and criminal intent to bribe a public officer.

Ask yourselves whether any one or more of the witnesses, the co-conspirators of this defendant, were aware of the purpose for which the Playboy Club checks were given to the defendant, and how they were used. Ask yourselves whether the defendant received these checks under a mutual understanding whereby he was to use all or a part of the proceeds of these checks for a corrupt and evil purpose, that is, to bribe a public officer?

The answer to this question should assist you in resolving the factual issue as to whether the defendant, and at least one other person, one other co-conspirator, possessed the requisite criminal intent.

Now, the last element of this crime is that the defendant, or any one of his co-conspirators, performed one or more [fol. 893] of the overt acts charged in the indictment. The law relating to this requirement is set forth in Section 583 of the Penal Law and it provides that no agreement amounts to a conspiracy unless some act beside such an agreement be done to effect the object thereof by one or more of the parties to such agreement.

Such an act done to further the accomplishment of the conspiracy's objective is known as the overt act. This is defined as the "open act," the outward and articulate manifestation of the conspiracy. The overt act must be a subsequent, independent act. It must follow the conspiratorial agreement and it must be done by any one or more of

the parties to the agreement and to further the purpose and object of the conspiracy.

In this connection the People allege in the second count in the indictment, the Playboy Club count, that this defendant and his co-conspirators committed some twenty-seven overt acts. Let me read to you that portion of the indictment which charges the commission of these overt acts.

"In furtherance of said conspiracy, and to effect the objects thereof, the conspirators committed, and caused to be committed, the following overt acts:

"1. During the month of May, 1962, the defendant Ralph Berger met and conferred with Arnold Morton.

"2. During the latter part of the summer of 1960 Arnold Morton met and conferred with the officers of Playboy Clubs International, Inc.

"3. During the month of January, 1961, the defendant, Ralph Berger, conferred with Arnold Morton in New York County.

"4. During the month of January, 1961, the defendant Ralph Berger and Arnold Morton met in New York County [fol. 894] a public officer attached to the New York State Liquor Authority.

"5. During the month of January, 1962, officers of Playboy Clubs International, Inc., met and conferred in New York County with a public officer attached to the New York State Liquor Authority.

"6. On or about May 5th, 1961, Playboy Clubs International delivered a check in the sum of five thousand dollars to the defendant, Ralph Berger.

"7. During the month of May, 1961, the defendant Ralph Berger conferred with Arnold Morton.

"8. During the latter part of the spring of 1961 the defendant Ralph Berger arranged a meeting between a certain attorney in New York County and Arnold Morton.



"9. During the latter part of the spring of 1961 the defendant Ralph Berger and Arnold Morton met and conferred with said attorney in New York County.

"10. In the early summer of 1961 Arnold Morton and another officer of Playboy Clubs International, Inc., met and conferred with said attorney in New York County.

"11. In the early summer of 1961 said corporation instructed in New York County the officers of Playboy Clubs International, Inc., to have the H.M.H. Publishing Company, Inc., the publishers of the Playboy Magazine, make payment to him on behalf of said Playboy Clubs International, Inc.

"12. On or about August 22nd, 1961 said attorney received from H.M.H. Publishing Company, Inc., a check in the sum of ten thousand dollars in New York County.

"14. On or about March 15th, 1962, said attorney received from H.M.H. Publishing Company, Inc., a check in the sum of eight thousand dollars.

[fol. 895] "13. On or about August 22nd, 1961, said H.M.H. Publishing Company, Inc., was reimbursed by Playboy Clubs International, Inc., in the sum of ten thousand dollars.

"15. On or about March 14th, 1962, said H.M.H. Publishing Company, Inc., was reimbursed by Playboy Clubs International, Inc., in the sum of eight thousand dollars.

"16. On or about June 28th, 1961, Playboy Clubs International, Inc., delivered to the defendant, Ralph Berger, two checks, one payable to Harry Steinman, in the sum of twelve thousand five hundred dollars and the other in the sum of twelve thousand five hundred dollars payable to Lee Berco Co., Inc., a corporation controlled by the defendant Ralph Berger.

"17. On or about August 17th, 1961, Playboy Clubs International, Inc., delivered a check in the sum of five hundred dollars to Ralph Berger.



"18. On or about February 5th, 1962, Playboy Clubs International, Inc., issued a check in the sum of eight thousand dollars to Lee Berco Co., Inc.

"19. On or about March 9th, 1962, Playboy Clubs International, Inc., issued a check in the sum of eight thousand dollars to Harry Steinman.

"20. On or about February 19th, 1962, Playboy Clubs International, Inc., issued a check in the sum of three thousand dollars to Lee Berco Co., Inc.

"21. On or about March 9th, 1962, Playhoy Clubs International, Inc., delivered a check in the sum of three thousand dollars to Ralph Berger.

"22. During the summer of 1962 said attorney in the County of New York arranged a meeting between Arnold Morton and a public officer attached to the New York State [fol. 896] Liquor Authority in a hospital in New York County.

"23. During the summer of 1962 Arnold Morton met and conferred with said public officer in a hospital in New York County.

"24. On or about August 16th, 1962, Playboy Clubs International, Inc., issued a check in the sum of four thousand dollars to Lee Berco Co., Inc.

"25. On or about November 20th, 1961, in the County of New York an application was filed on behalf of Playboy Clubs of New York, Inc., for a restaurant and liquor license with the New York State Liquor Authority.

"26. On or about December 22, 1961, in the County of New York, said application was granted by the New York State Liquor Authority and a license was approved subject to certain conditions.

"27. On or about December 7, 1962, in the County of New York, a license was issued by the New York State

**"Liquor Authority authorizing the sale of liquor at the Playboy Clubs of New York, Inc., in New York County."**

In connection with the first count in the indictment, the Tenement Count, the People allege the commission by this defendant and his co-conspirator, Frank Jacklone, of twelve overt acts. I will now read that part of the first count which relates to the commission of those overt acts.

"In furtherance of said conspiracy, and to effect the objects thereof, the conspirators in the County of New York committed and caused to be committed the following overt acts:

[fol. 897] "1. In and about the end of May, 1962, the conspirators Frank Jacklone and Harry Steinman met and conferred.

"2. In or about the month of June, 1962, the defendant conferred with Frank Jacklone.

"3. In or about the month of June, 1962, the conspirator, Harry Steinman, conferred with the defendant.

"4. In and about the month of June, 1962, the conspirators Harry Steinman and Frank Jacklone met and conferred.

"5. On or about June 21, 1962 Frank Jacklone delivered to the co-conspirator Harry Steinman twenty-five hundred dollars.

"6. On or about June 25, 1962, the defendant went to a hospital in New York County.

"7. On or about June 25th, 1962 the defendant met and conferred with a public officer attached to the New York State Liquor Authority.

"8. On or about June 25th, 1962 the defendant Ralph Berger met and conferred with co-conspirators Harry Steinman and Frank Jacklone.

"9. On or about June 28th, 1962 Frank Jacklone received a license from the New York State Liquor Authority to sell liquor at the Tenement.

"10. On or about June 29th, 1962 the defendant and the co-conspirator, Harry Steinman, met and conferred.

"11. On or about June 29th, 1962, Frank Jacklone delivered seventy-five hundred dollars to the defendant Ralph Berger.

"12. On or about June 29th, 1962 the defendant went to a hospital in New York County where he met and [fol. 898] conferred with the said public officer attached to the New York State Liquor Authority."

Again, let me repeat that an agreement with two or more persons to commit a crime, standing alone, is not sufficient to constitute the crime of conspiracy. So that if two persons planned to commit a murder, for example, by poisoning another, and each possesses the corrupt and evil motive to murder, yet neither is guilty of any crime, but just as soon as either of them takes one step forward to carry out their plan to kill, as, for example, if one of them purchases some arsenic at a drug store for such purpose—then, having committed an overt act, an open act, to further the object of their agreement, each would then be guilty of conspiracy without doing another thing.

This simple example should suffice to make it clear to you that this defendant cannot be found guilty of either crime charged without the additional proof establishing that an overt act occurred, that is, any single act done by any one, or more, of the conspirators to effect the purpose and object of the conspiracy.

Concretely therefore, with respect to the first count in the indictment, the Tenement count, if you are satisfied beyond a reasonable doubt that Ralph Berger, in the County of New York, from on or about the end of May, 1962, up to and about June 29th, 1962, did knowingly, wilfully,

wrongfully, and unlawfully, and corruptly, conspire with one or more other persons to commit the crime of bribery of a public official, and specifically agreed to give, or offer, or cause to be given or offered, a bribe, that is, a sum of money, to Martin Epstein, with intent to influence him with respect to any act, decision, vote or opinion, or other proceeding in the exercise of the powers or functions which he had, or might have had, relating to the issuance of a license by the New York State Liquor Authority, to [fol. 899] sell liquor at a supper club known as The Tene-ment, then you will be justified in finding the defendant guilty of the crime of conspiracy, as charged in the first count of the indictment.

Conversely, should you have a reasonable doubt as to the existence of any element of this crime, as I have defined it, then you should return a verdict of not guilty.

So also with respect to the second count in the indictment, the count which I have referred to as the Playboy Club count. If you are satisfied beyond a reasonable doubt that this defendant in the County of New York, from on or about July of 1960, to on or about December 7th, 1961, did knowingly, wilfully, wrongfully, unlawfully and corruptly, conspire with one or more other persons to commit the crime of bribery of a public official, and specifically agreed to give and offer, or cause to be given, or cause to be offered, a bribe, that is, a sum of money to Martin Epstein, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding in the exercise of the powers or functions which he had, or might have had, relating to the issuance of a liquor license by the New York State Liquor Authority, to sell liquor at the Playboy Club, located at 5 East 59th Street, in New York County, then you will be justified in finding this defendant guilty of the crime charged in the second count of the indictment, the crime of conspiracy.

On the other hand, should you entertain a reasonable doubt with respect to the existence of any element of this

crime, as I have charged it, you should return a verdict of not guilty.

As you know, there are two counts in the indictment which the Court is submitting to you for your consideration. The first count is the Tenement count and the second count is the Playboy count. You are not bound to consider the defendant's guilt or innocence of these counts in the order [fol. 900] in which they are set forth in the indictment. You and you alone have the discretion to consider these counts in any order you desire.

In your deliberations the evidence relating to each count should receive separate consideration and you will be called upon to render separate verdicts with respect to each count.

Your verdict in this connection need not necessarily be the same. You may find the defendant guilty of only one count, and not guilty of the other count, or you may find him guilty of both counts, and equally true is the fact that you may find him not guilty of both counts.

Your form of verdict will be, as follows:

With respect to the first count, charging the crime of conspiracy, guilty or not guilty.

As to the second count, charging the same crime of conspiracy, guilty or not guilty.

A verdict chart has been prepared and has been shown to both counsel, and it embodies these forms of verdict, and you will have this verdict chart with you when you retire.

Now, members of the jury, as judges of the facts, it is the duty of every juror while deliberating to give careful consideration to the views and opinions of your fellow jurors. Do not walk into the juryroom with your ears stuffed and say that you don't want to listen to anything that your fellow jurors might have to say, that you have made up your mind. It is not fair to the People and it is not fair to this defendant.

Discuss this case openly and honestly and compare your views and opinions with an honest desire to arrive at the



truth, and with a view toward arriving at a verdict, if a verdict is at all possible.

As judges of the facts examine them calmly, coolly, dispassionately and deliberately, and above all make no determination on the facts which in the slightest degree is influenced by fear, or favor, or passion, or sympathy, or prejudice. I charge you that the expression of any one of these emotions in such a concrete form as to overcome the force of facts found by a juror in his or her deliberations is a violation of your oath.

Before any verdict is reached such verdict must be unanimous, all twelve jurors who deliberate must agree.

[fol. 907] The Court: (Continuing charge) I have been requested to clarify that portion of the Court's charge which relates to your purported evaluation of the two transcripts, Exhibits 62 and 63, admitted in evidence for the limited purpose for which the Court has heretofore recounted.

I never intended to state or give any juror the impression that he or she was obligated to evaluate its contents, because this is not evidence. Having utilized these two transcripts for the purpose for which they have been given to you, you are to disregard its contents, because it is not evidence.

#### VERDICT

[fol. 916] The Clerk: People against Ralph Berger on trial. The defendant and his counsel are present in court. The District Attorney is present. Jurors answer as your names are called (all 12 answer present). The alternate jurors kept separate and apart from the jury in chief, please answer (both alternates answer to their names).

Will the Foreman please rise; and the defendant please rise. Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: As to the first count how say you?



The Foreman: Guilty.

The Clerk: As to the second count how say you?

The Foreman: Guilty.

[fol. 918] The foregoing transcript is a true transcript of our stenographic notes taken at the Trial of People v. Ralph Berger.

Michael J. Mickell, Official Stenographer;

Reginald C. Mershon, Official Stenographer;

Irwin C. Shaw, Official Stenographer;

Emanuel Morris, Official Stenographer.

[fol. 932]

New York, December 7, 1964.

Mr. Brill: Your Honor, there is pending before you the grant of my application reserving all motions to the date of sentence.

The Court: Yes.

Mr. Brill: At this time, with your Honor's permission, I would like to exercise the right, one, to move to set aside the verdict upon the grounds set forth in the Code of Criminal Procedure, Section 465, and more particularly on the grounds that the verdict is against the weight of the evidence and against the law; that, with all due deference to the Court, prejudicial error was committed by the reception in evidence of Exhibit 61-A, a certain tape recording, and in the Court's denial of the defendant's application to suppress Exhibit 61-A, which was obtained as a result of, concededly, a trespassitory invasion of a Constitutionally protected area in violation of the defendant's Constitutional rights of privacy, due process, and the right to be free from self-incrimination and unlawful searches and seizures.

When I said "concededly", I don't mean that it was conceded that it was so obtained in violation of these rights, I mean to say that it was concededly the means by which all of the evidence, and all of the leads to evidence in this case tried before this Court was obtained by reason of eavesdropping, pursuant to the provisions of orders issued under Section 813-A of the Code of Criminal Procedure, which in the circumstances involved in this case, it is urged by the defendant, constituted trespassitory invasions of constitutionally protected areas. I did not want there to be any misunderstanding with respect to that.

On the further ground that, with all due deference to the Court, the Court committed prejudicial error in ad-[fol. 933] mitting that tape in evidence, although it was so inaudible, unintelligible, full of gaps and blank spaces, that it was utterly without probative value.

On the further ground that in the reception of Exhibits 62 and 63, even for the limited purpose which the Court instructed the jury that these exhibits would be received, with all due deference to your Honor, the Court committed prejudicial error in permitting the reception in evidence for that limited purpose of those exhibits.

On the further ground that the failure to provide earphones for members of the public who were attendant upon the trial, at the time when the transcript was played and the jury was furnished with earphones, constituted a deprivation of the rights of the defendant under the 6th Amendment to the Constitution of the United States, and the 5th Amendment, as well.

[fol. 935] The Court: Your motion is denied, you have an exception.

Mr. Brill: Very good, sir.

[fol. 936] He has never before been in conflict with the law. So far as I am informed he has never been convicted of a

crime and he stands before your Honor convicted for the first time in respect of two misdemeanors.

Mr. McKenna:

This defendant profited handsomely by his activities in corrupting public officials.

#### SENTENCE

The Court: Now, Mr. Brill, I did receive these letters to which you have alluded and one cannot be a human being without recognizing the fact that this defendant does have a good many friends who think highly of him, and reading the letters inevitably takes its emotional toll upon any Judge.

However, the irreducible minimum in this case establishes clearly that this defendant is a broker in corruption, if you care to characterize him that, or even a wheeler dealer in corruption. That was clearly established by the evidence, and the Court feels that the ends of justice will be served if concurrent sentences of one year on each count be imposed on the defendant.

Penitentiary one year on each count, said sentences to run concurrently and not consecutively.

I hereby certify that the foregoing is a true and accurate transcript of all proceedings taken by me upon the sentence of the above-named defendant, Ralph Berger, held on December 7th, 1964, in Part 32, Supreme Court, New York County.

Reginald C. Mershon, Official Stenographer.

[fol. 937] Stenographer's Minutes (by Three Stenographers Each Separately Taking Notes simultaneously) of Proceedings Out of Jury's Presence on October 15 and 20, 1964, During Preliminary Playing of Certain Tape Records.

Note: The minutes of Stenographer Mickell, as herein printed, include pertinent colloquy. The minutes by Stenographers Reginald C. Mershon and Irwin T. Shaw, as herein printed, include only so much of said colloquy as conveniently serves to preserve continuity.

Mr. Brill  
Indictment No. 1402-63

---

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special and Trial Term: Part XXXVIII

---

THE PEOPLE OF THE STATE OF NEW YORK

against

RALPH BERGER, Defendant.

---

100 Centre Street,  
New York 13, N. Y.  
October 15, 1964.

Stenographer's Minutes of Proceedings Before and During a Preliminary Playing of People's Tape Recordings.

Michael J. Mickell, C.S.R., Official Stenographer.

[fol. 938]

MINUTES BY STENOGRAPHER MICKELL, OCTOBER 15, 1964

Indictment No. 1402-63

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special and Trial Term: Part XXXVIII

---

THE PEOPLE OF THE STATE OF NEW YORK

against

RALPH BERGER, Defendant.

---

100 Centre Street,  
New York 13, N. Y.  
October 15, 1964.

Before: Hon. Mitchell D. Schweitzer, J.

Appearances:

For the People: Jeremiah B. McKenna, Esq., and David A. Goldstein, Esq., Assistant District Attorneys.

For Defendant: Joseph E. Brill, Esq., and Bernard J. Levy, Esq., 165 Broadway, New York, N. Y.

(Mr. McKenna, Mr. Goldstein, Mr. Brill, Mr. Levy, and the Defendant are present.)

Mr. McKenna: Your Honor, at this point the People offer to play out of the hearing of the jury and in the courtroom, where the public has been excluded, electronic [fol. 939] tapes of conversations which we recorded over an eavesdropping device installed in Room 801 at 15 East 48th Street.

These are conversations between Harry Steinman and Ralph Berger.

Of the three conversations, one of them also contains a conversation between Harry Steinman, Ralph Berger, and Frank Jacklone.

We intend to play them now as to their audibility and the relevancy of the material contained therein.

At a later date, when they are offered in evidence at the trial, we will establish the competency of the machine to record, the competency of the operator of the device, the chain of evidence—

The Court: Chain of preservation.

Mr. McKenna: —and the chain of preservation of these tapes. We will establish that these tapes have not been altered or tampered with prior to their being offered.

I also want to make this caveat: That we have offered certain transcripts to accompany these tapes so Your Honor might better follow what is being said.

There may be certain phonetic sounds which Mr. Brill may interpret differently than what we say; just "Ah" and things like that, as you will listen to the tape. We reserve the right to make any corrections in the transcript as directed by yourself and should Mr. Brill so ask.

We also say at this time that we were recording at the speed of the participants in the conversations, so that I would like the Court to understand that the stenographers may be unable to keep up with what is being said, because they are speaking at their own conversational pace; and I want it understood that, if they were testifying in court, let's say, they could be stopped or slowed down, if the stenographer lost the thread. So that, if the stenographers are unable to keep up with what is being said, we want the right to go back and replay it.

[fol. 940] We also would like it understood at this point that we have not identified the voices of this conversation.

The Court: Well, that is reserved for the trial.

Mr. McKenna: At the trial, there will be a voice identification by detectives from the District Attorney's office.

So, for the purpose of this hearing, it will be understood that Detective Feely can identify the voices for the Court.



He has heard both Mr. Steinman and Mr. Berger on occasions. He is not the detective who transcribed this particular tape.

Mr. Brill: Can we have it clear as to whether this is the original tape or is it a re-recording of the original tape?

Mr. McKenna: Excuse me.

Mr. Brill: Is this the original tape or—

Mr. McKenna: This is the original tape, Your Honor. We have made a re-recording and the transcripts that you see are from the re-recording, in order to preserve the tape for replaying, etc.

Mr. Brill: Now, Your Honor, I believe that to clear the atmosphere it should be noted on the record that the District Attorney has resisted the suggestion that the entire tape should be played, as it were, in camera, now, on the ground that there may be segments of it which may be unrelated to or irrelevant to the issues on trial before the Court and jury.

I urge the Court with all of the vigor I possess that to permit a segmentation of the tape at the will of the District Attorney is not to make such a presentation of the matter as will enable the Court properly, in the recognition of the defendant's rights, to make such rulings as the Court may be called upon to make in respect of audibility, in respect of relevancy, and in respect of any other elements on the basis of which the Court may be obliged to make a ruling.

Mr. McKenna: To clarify this, Your Honor—

[fol. 941] Mr. Brill: Particularly, I make the point, because it has been represented earlier to the Court, that there are segments, which it is intended now not to play, dealing with the alleged co-conspirator Steinman, who is named in both counts of the indictment on trial before Your Honor and the jury.

It seems clear and unequivocal that in order for the Court to be able, basically, to make a determination with respect to its obligations to make such determinations, the

entire original tape should be played from beginning to end, without affording the District Attorney the privilege of segmenting it as he pleases.

The public, as such, is excluded by consent of the defendant, as well as the District Attorney. No prejudice can result to the People. On the other hand, prejudice easily could result to the defendant. And in the jealous preservation of the defendant's rights, to avoid such possibility, it would be totally unfair to hear the tape, except in its entirety.

The segmentation of it at the will of the District Attorney, or his designees, who may or may not have been present at the time, cannot correctly present the picture.

For example, it has been suggested that there may be matter on the tape for two hours before that portion which the District Attorney has decided to present as a segment which he is willing to offer on the trial of this case. He doesn't have the right to do that. Without a hearing of the full tape, there can be no determination fairly made that these other segments which are sought to be excluded are not, in fact, exculpatory. It would constitute a denial of simple justice to do that.

Mr. McKenna: Your Honor, as the evidence will show when the tape is offered, or, rather, I will state now instead of at the trial, the tape for example, in Mr. Steinman's office was placed on the recording machine on June 26. It was used to record conversations on June 27. We [fol. 942] feel that the conversations of Harry Steinman alone, out of the presence of Ralph Berger, on unrelated matters to this case, have no bearing on this particular case.

And, with all due respect to Mr. Brill, as far as we are concerned, the defendant is a close associate of Mr. Steinman, and we don't want Mr. Steinman to get a preview of evidence we intend to use at a separate and distinct trial of him.

Mr. Brill: I make the representation to Your Honor—

Mr. McKenna: Let me finish.

Mr. Brill: —that the matter contained on the tape—

The Court: Let him finish first.

Mr. Brill: —will not be given to Mr. Steinman. I have no interest in him. I am interested only in this defendant.

Mr. McKenna: Your Honor, it is the client—

Mr. Brill: May I bring something out?

Mr. McKenna: I haven't finished.

The Court: He hasn't finished, Mr. Brill.

Mr. Brill: I beg your pardon.

Mr. McKenna: Material separate and distinct from the conspiracies which are the subject of this charge has no relevance to this particular hearing, Your Honor, and we feel the People should not be forced to reveal what is on the tape.

Mr. Brill will have an opportunity to go into this at the trial, if he wishes to question the detectives, but I don't think the People should have to play tapes of a preceding day, out of the presence of the defendant and unrelated whatsoever to his conspiracy.

Mr. Brill: I respectfully invite Your Honor's attention to the salient facts set forth in the indictment itself, namely, Count 1 alleges a conspiracy between the defendant Berger and his co-conspirators, Harry Steinman and Frank Jacklone, in a conspiracy which was made in the County of New York from on or about the end of May, 1962, continuously, if you please, up to on or about June 29, 1962. I didn't select these dates. The District Attorney did. And with respect to Count 2, the allegation of the indictment is that the defendant Berger, with Harry Steinman and Arnold Morton, and divers other persons, being co-conspirators, entered into this conspiracy from on or about July of 1960, continuously up to and on or about December 7, 1962, all of which includes the period for which they have tapes and which they now suggest they may be permitted to segment and keep from the Court and from the defendant.

I submit, Your Honor, they don't have any such right. They selected the dates; they wrote the indictment; they had all the facts at hand at the time they did it—

Mr. McKenna: But, Your Honor—

Mr. Brill: —and they made the tapes as well.

Mr. McKenna: —they could be engaged in other activities other than this particular conspiracy.

The Court: I am aware of that. Then at this time you may play the tapes that you plan to introduce for the purposes set forth in the record, and I will reserve decision on your application to direct that the balance of the tapes be played.

Mr. Brill: Can we, for the record, Your Honor, have an identification of the reel number and the lines on the reel which are now being offered under the limited offer made by the District Attorney and on which Your Honor has ruled?

Mr. McKenna: Reel number.

Detective Feely: The reel number is 5483.

Mr. Goldstein: Mr. Brill, what is the time of the conversation you have, of the transcript.

Mr. Brill: Ten-fifty a. m.

Mr. Goldstein: And I am handing a copy of the same transcript to the Judge.

[fol. 944] Mr. McKenna: What is the line?

Detective Feely: It is 643, line 643.

I will give you the line on the end.

Mr. Brill: Right.

(Thereupon, Reel No. 5483 was played by Detective Feely as follows: The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...")

"Good morning. I am sorry to be late.

"Yes, yes . . .

"Yes, more or less . . .

"Listen . . .

"Now, use a check . . .

"Yes, yes . . .

"As long as your name on it . . .

"Oh, good . . .

"Maybe I'll give it for 250. In fact, I'll make sure you keep . . . at least for a month and a half, until we get this monkey straightened out.

"No, sir, not like you tell me.

"No, I won't do . . .

"No, not put it off . . .

"Harry, Harry.

"I am turning down your 750, Frank. Neyer, you know, he asked for money. I says, 'Look, kid's in trouble; you are going to get \$750,' and he screamed at the fifty. From two thousand to 750. You had it . . .

"You make it . . .

"I told him . . . We will try to get off a couple hundred more and make it a thousand. But right now make it 750.

"That is your obligation.

"Do we get 750?

"No, 250, 250, 250. You got to get 500 in cash. I know you don't have it now.

[fol. 945] "No, sir.

"But I am going to lay that out for you.

"I can have it by Monday.

"That is all right. I am going to lay this out for you. I am going to lay this five hundred out for you. But I told Neyer I asked you 750 and Monday \$7500, supposed to pay that . . . forty-five or fifty.

"Well, count it.

"Anybody can make a mistake.

"What are you going to do with the big \$50 show . . .

"Anything I can do for you today?

"No, sir.

"Huh?

"You all set?

"Get everything . . .

"Now, you know . . .

"Why?

"Because I got . . .

"You know you can pick up . . .

"This is all shit . . .

"Yes.

"Ralph, you think that's big enough to set up for five in there?

"Yes.

"You saw it again yesterday . . .

"That's the only way I can see that you are really going to get your money back.

"The attorney walked in. I am sure.

"Now, who actually are you partners with now?

"Actually?

"Yes.

"Nobody.

"Nobody?

"Nobody.

"I know it is all your money.

"Well, I am going to pay it . . .

[fol. 946] "After an hour I gave him a choice . . .

"That means that he had . . . business . . .

"How do you suppose he spells it?

"I don't keep those. Nobody brings it out . . .

"But as of now, as of this year, this year, it is me; I am the only one that is out.

"Uh-huh . . .

"Ralph, you want to discuss that with the guys today or do you want to wait?

"What? . . ."

Mr. McKenna: He is counting the money.

"Fifty-five in ones.

"That is all I made it.

"One . . .



"Okay!

"Yeah.

"Be back here around twelve, one o'clock . . .

"Where?

"I want to see my father. .

"Where are you going? To the hotel?

"Well, I will be at the hotel.

"Oh, he is all right . . .

"Why don't you let him mail it out for you? . . .

"Ralph . . .

"We will take it up with you later. .

"All right . . .

"Are you going to stay here that late?

"I am going to go there after lunch.

"Now, you take yourself a fine . . .

"Yes, . . .

"Anything maybe we could help you with now?

"I am just . . .

"I tried . . . take it.

"Another thing I said, and I meant it . . .

"I had . . .

[fol. 947] "That is the only thing . . .

"And \$500 . . .

"Hello.

"Yes.

"Who's calling?

"Harriet?

"What happened, Harriet?

"Well, have a good time. You need him for something?

"All right, hold on . . .

"Hello . . .

"Who? . . .

"And the . . .

"Not even . . .

"No, I don't want to . . .

"You can't depend on . . .

"I know Brownie for years.

"If I am going . . .

"Twelve o'clock. Brownie ought to be there eleven-thirty . . .

"Sure it is . . .

"That's all . . .

"Twelve o'clock . . .

"No money back?

"No.

"What time? . . .

"That is the only thing you can't be.

"I don't want to monkey around . . . with Newark now.

"Take a bus to Newark. What's the difference?

"All right, I'll tell you what I will do. Put it out on a stand-by on the other one.

"Put me on the other one on a stand-by . . .

"Chicago . . .

"What time does that get in? . . .

"Put me out . . .

"Chicago, 111 North Wabash.

[fol. 948]. "That is the only Western you got?

"Yeah.

"Hello.

"Yes, Sal.

"Hiya, George.

"Good, how are you?

"Oh, operator, why are you putting these through?"

"Very good. Very good.

"I am asking for a reservation and you are giving me a list of restaurants . . .

"No, the reason, George, I finally gave him the reservation for a week so he wouldn't have to . . .

"Now, you want my office address now? You want my home address? . . .

"Now, No. 1, the hotel is at 148 East 45th Street. I have an office here—148—at 15 East 48th Street.

"Well, this is the first time that I have ever gone through here in an investigation to get a reservation.

"George.

"Yes, all right.

"Yeah.

"No show.

"This is not our opinion; this is his opinion. We don't have to put the money up; he does.

"I suppose . . .

"Say, George, you want to talk to him? It's your privilege.

"Roy, you want to meet me down there tonight?

"What time?

"Yeah. And Ralphie . . .

"What he says . . .

"Yes . . .

"No. I tell you, I am going to my product. I guess I prepared . . .

"Weight, 150 pounds.

"Yeah . . .

[fol. 949] "One hundred and fifty, \$100,000; how can I carry . . . It is a lot of dimes."

"It is a lot of dimes. Are you sure? . . .

"What do we need dimes for, huh? . . .

"Why don't I, you know, breaking nice dollar bills . . .

"Fine . . .

"Yes. Yes.

"All right . . .

"Yes.

"I got to get . . .

"What did you get on . . . stand-by . . .

"How about . . .

"Four o'clock . . .

"For a while . . .

"Stay there?

"Yeah . . .

"I got to go to Newark. I want to go straight down.

"Newark is closer than Idlewild.

"Might even take a taxi . . .

"No, you know it.

"That's all.

"What's the difference? You go from the hospital at 42nd Street, a sixty-second cab ride through the tunnel, the east-side tunnel, the west tunnel . . .

"Eighth Avenue, Ninth Avenue . . .

"Yes.

"No, but, I mean, you got me here. You got four lousy . . .

"Figure for a long week end; free Saturday and Sunday. That is a lot of . . .

"What do I do?

"About five and tens . . .

"I get eight hundred . . .

"All right. Okay . . .

"More . . .

[fol. 950] "I will get two hundred from . . .

"All right. Okay . . .

"Okay, yes.

"Yes.

"Yeah. I am going to meet George down there tomorrow night. He has got a guy . . .

"All right, I'll be down there.

"But I will get the whole meeting . . . the money for this show.

"Okay.

"And . . . they don't want to lose this. They are looking at fifteen hundred a week for eight weeks or more, you know. But . . .

"A show pays . . .

"The only thing I could . . .

"I will see you tonight. Good luck.

"Good luck, Frank."

Mr. McKenna: Now it resumes.

"I have it, but, if you need it, I will get it . . .

"Sixteen hundred . . .

"I am going to lay out the five hundred . . .

"Ralph, I can't help it; I am this way. I couldn't get up the guts to do it. I just didn't have the guts. If the guy collects money from Nat, I am going to ask him for it. I mean, I think that the guy . . .

"There is fifty-five . . .

"Yeah.

"Just give him fifty . . ."

Mr. Brill: Line number, please, for the record.

Detective Feely: 1003.

Mr. Brill: May the record show it is now 6.40, Your Honor.

Mr. McKenna: Will you take that off and we will go to the next one.

[fol. 951] Your Honor, just a comment. There was a block of conversation there that is not in this transcript. You recall that there was conversation about many dimes, single dollar bills. I will bring all that out through Mr. Jacklone when he takes the stand as to why this happened.

Mr. Brill: Yes. It is Reel No. 5517. Is this what you are playing now?

Detective Feely: That is what I am putting on, yes, sir.

(Thereupon, Reel No. 5517 was played by Detective Feely as follows: The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: " . . . ")

"Hello, Neil, how are you?

"Pretty Good.

"What's new?

"What's new with me?

"Well, we'll . . .

"Lawson . . .

"Who?

"Oh.

"You called. I'm still in New York. I am leaving now.

"Yeah...

"Yeah...

"For Monday morning...

"Tuesday morning.

"What time?

"Any time in the afternoon?...

"How about the morning? How about about ten o'clock?

"About ten o'clock.

"I don't say...

[fol. 952] "Huh? Before nine...

"Okay.

"Good enough.

"All right.

"All right....

"I thought you had a license, what you call a charge-account license, about \$1,000...

"No credit...

"Charge account.

"Charge account.

"What do you mean by 'charge account'?

"One thousand dollars. You haven't got the right to sell in a private key club...

"What is, the hell is the, what you want to call it? Call it a club, charge-account club.

"Right. In other words, he isn't supposed to sell, supposed to sell private; let the public in.

"This is what I have trouble with now. We have a lot of trouble with it...

"It will be dead, but they don't care...

"But they are going to ... on account, you know ... it will be dead...

"They are liars...

"Anybody...

"Yes...

"You won't introduce...



"What do you call it . . .

"Pick me up at 6.15 . . .

"He goes that way . . .

"Six o'clock . . .

"Airport . . .

"Where?

"To Idlewild.

"Oh.

"You're late. Four o'clock. I got to go over here—  
Newark . . .

[fol. 953] "No . . .

"Everything . . .

"I got five, I got four, I got six . . .

"(Laughter.)

"Don't let . . .

"He has been hollering about that.

" . . .

"In other words . . . this is not done.

"I tell you it will never be done . . .

"No, he don't want . . .

"No . . .

"People . . .

"He doesn't waste time . . .

"I know . . .

"Anybody . . .

"I tell you, we might give you . . .

"We might let them do it.

"I think we might let them . . .

"That's right . . .

"You get five . . .

"(Laughter.)

" . . .

"What are you, crazy? . . .

"I don't know . . .

"They have a special conference . . .

"Come up . . .

" . . . one word.

"Nothing...

"Yeah...

"The only way I can go to the...

"The only way I can go to these people and say this is worth something...

"The only thing you can tell 'em is this...

"Forget it...

"The last time... I mean...

"Preuss...

[fol. 954] "He said that... I asked him...

"I am going to beat him...

"I am going to find out what the hell he's got...

"... what the hell he wants us to do.

"Ralph...

"Straighten us out...

"How much do you want...

"I can't do it...

"What can we do to him?...

"So what did I tell you?...

"Keep everybody out...

"There are probably several lawyers, and the lawyers will tell 'em this is it..."

Mr. Brill: Line number, please.

Detective Feely: 207.

Mr. Brill: 203?

Detective Feely: 207.

Mr. Brill: And the time is 6.58.

As I understand it, that was Reel 5517 of the June 29, 1962, 4.46 conversation. Is that what it is supposed to be, Mr. Goldstein and Mr. McKenna?

Excuse me. 5517, June—

Mr. McKenna: Yes.

Mr. Brill: I understand that you have another on the same reel, later in the day, 5.15 p. m.

Mr. McKenna: Dave, what is the next one?

Detective Feely: It is going to be a problem to find it. I have nothing to go by. I have no way of knowing ex-

actly where it is, where the man who took it would. I thought perhaps it might be the next conversation, but apparently it is not.

Mr. McKenna: In effect, we are playing the whole tape.

[fol. 955] Detective Feely: I am attempting to locate this conversation.

The Court: Is this what you are going to play now?

Mr. McKenna: Yes, but we have to locate it on the tape.

✓ This is not being offered.

Mr. Brill: No. I understand that. This is under the limited offer.

Detective Feely: The line number would be 271.

Mr. Brill: 271, line number, started at 7.05.

(Thereupon, Reel No. 5517 was further played by Detective Feely as follows: The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...")

"... It is murder."

Mr. Goldstein: That is the start of it.

"Now, wait, before you go, what time will you be in Monday morning, Ed?

"All right. I'll be there at ten o'clock . . .

"Call me on the phone. Call me on the phone, then, 10.15, long distance . . .

"All right, Harry . . .

"I had to stay over for something . . .

"No . . .

"While I am waiting for you to do something . . .

"What . . .

"Not a thing . . .

"Yeah. Yes, Sam . . .

"Yes, very nice . . .

"Because I thought . . .

"Well, you know now . . .

"What good did it do? Let's put it this way: What good did it do?

"I found out one thing. There's only one bottle left now . . .

[fol. 956] "Well, not that . . . Harry. I'll see you ten o'clock Monday morning.

"I get it . . .

"All right . . .

"Other things . . ."

Detective Feely: Line 308.

(7.09 p. m.)

Mr. Brill: Is there still another one?

The Court: One which was not transcribed.

Mr. Brill: Sir?

The Court: One which was not transcribed.

Mr. Brill: Would you give us a transcription of it. I want a copy of this in the morning.

Mr. Goldstein: 9483, June 28.

Detective Feely: Line 27, roughly.

Mr. Brill: Twenty-seven.

Detective Feely: I should really go back another few words. I will tell you the line number as I find it. It will be about 22, I think, would be a better line; 23, actually. I beg your pardon.

Mr. Brill: Twenty-three?

Detective Feely: Yes, sir.

Mr. Brill: Very good.

(Thereupon, Reel No. 9483 was played by Detective Feely as follows: The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: ". . .")

". . . Going to push you around, huh?

"Yes.

"Hey! One thousand . . .

"No . . .

"What do you think happened now . . .

"The kid's got the paper in his hand. He's on his way up.

"What are you going to do now? . . .

"Well, when do you think you will open?

[fol. 957] "Tomorrow night . . .

"He's on his way up . . .

"You know . . .

"No . . .

"Running after him . . .

"So . . .

"Yes, but Frank was here from New York.

"He's there waiting for him.

"Yes, he was waiting for Frank. Brownie is coming over . . .

"Yes, but he can't run . . .

"Well, the most important thing, the kid's got the paper in his hand and he's flying tomorrow night. Let's celebrate. All right. I'll be with my gang, so I'll be talking to you later. All right, fine. Oh, sure . . .

"Yeah.

"Yeah.

"We'll call you and I'll give you, you know, a reservation . . .

"Always . . .

"Everything, the whole world . . .

"We're silly on this, nothing about . . .

"We want to make a trip.

"I know, but we're silly.

"We will take the money, but we don't make the trip.

"Crucify the guy . . .

"Almost a week there . . .

"Listen, you relax and make yourself at home. You are going to be around here a long . . . So relax. Do you hear? Just relax. You know, be free. Do what you want to.

"I'll be . . .

"One thing, Ralph. We are waiting for some guys and I might as well be free . . .

"Ralphie, are you going back tonight, then?

"Probably midnight.

[fol. 958] "... on that late train? Maybe you will have dinner with Peggy and Daffy . . .

"Happens to be a very pretty girl; very pretty, pretty girl. Did you have any pictures . . .

"Oh, no . . .

"Francis . . .

"Oh, boy! I was all set to go to Florida for a few days. I was pretty tired. I never took a vacation in my life. I go to Europe three times a year, but it is always business. So next week I was going to Florida Thursday. I will be there Friday, Saturday, Sunday—wonderful. You know, Thursday morning I wake up . . .

"Did you ever go to Florida?

" . . . . .

"Never been there?

"No . . .

"Tomorrow afternoon . . .

"Good hunting, tomorrow or Sunday . . .

"Unbelievable, she is like thirty from being around show people all the time. And her mother is a fairly good name in show business, you know. Around these people in the house all the time. She is on the road a year and a half traveling with the show. You know, you would be surprised. This is better than school for these kids. I'm not kidding you because . . .

"And I said, 'Honey, I'm going to be busy tomorrow, tomorrow and Friday afternoon. Why don't you go to the beach? You have got the car . . .

"You better.

"You know . . .

"In other words, be here one o'clock . . .

"Thursday we made arrangements. I got to see her the day she wants. I see her about once a week, you know,



but we're divorced. I see her once a week, but I got to see her when she wants. Would you say she is spoiled? . . .  
[fol. 959] "No, not . . .

"Yes, but I give her a fin every week . . .

"Well, somebody puts it 'way on her back; and she is at a private school. So every time the kids have a birthday and all exchange gifts and things are like before. When she goes to the store to buy something for the kids, she is not afraid to ask why so much money, you know. Seven and a half years old. It is amazing. But all the kids today are . . . years ahead of us . . .

"They argue . . .

"You do . . .

"Next week we will be out of here, Joe . . .

"Do the best we can . . .

"Later on, you know . . . next week . . .

"Who else you going to see? You don't have to see anybody else . . .

" . . . last night. It was all taken care of last night. And all they wanted was, like I said, go and get a girl. Who else can you get but the girl. She has got instructions. She knows what to do . . .

"What do you mean . . .

"You know what to do . . .

"One has nothing to do with the other . . .

"Work together . . .

"Get them off tonight . . .

"Over six months already, you know. Put the phone away . . .

"You didn't discuss . . . money or nothing.

"I don't know whether you did or not. I was going to tell 'em that the lawyers have to be paid.

"Well, I'll tell 'em.

"Yes . . .

"What's the difference? I told 'em about it before.

"Yes, but I am going to be a nice fellow.

"Pay the other 250. What the hell's the difference? . . .

"About . . .

[fol. 960] "You are right; you are not wrong . . .

"Ralph, you are right, but let me explain, let me explain. It's this kid, ~~and~~ if that is your . . . and my . . . but this kid hasn't got hit so hard . . . Give Ralph a couple little bones, you know . . . You may never get your money from that . . . He can't be a cop, he can't hit the gutter; what do you do with a guy like this?

"You keep taking a thousand every time, you know, the kid . . .

"Hello.

"Yes, John.

"Yes, Bill.

"How are you, sir?

"Look . . .

"Yeah. I told you they are trying to tighten up these reservations . . .

"Not from that . . .

"I told the sister.

"Oh, you did?

"Sure.

"What did you say to her?

"Very nice, the sister is. It is her kid. You know, the kid, that is all. Only the kid. I don't care about the other one. I don't care any part of what happens to him. The District Attorney, you know . . .

"What do you call it . . .

"What do you think this man is going . . .

"After all, it is a big . . . make a mystery out of it . . .

"Bad situation . . .

"And her sister is very worried. So I says . . .

"I don't know . . .

"Well, she said she didn't know, you know this bullshit. You know what? I did what she wanted me to do.

"Yes.

"You know what she asked me to do. She asked me to do it and I did it.

[fol. 961] "He is going to get it. He is going to get it. The District Attorney. No threats, you know . . .

"The District Attorney got it. It is just a bad thing. So everybody gets hurt, but he is going to wind up losing his life.

"Hello. The lawyer, one thousand bucks . . .

"Two thousand more . . .

"Studebaker for a couple thousand . . .

"Do you think he . . .

"You know how . . . This man is an old man I am talking about and he has got \$110,000 blown in the shit house, if you work this right.

"Ralph, how sure are you? How sure . . .

" . . . put up the money . . .

"That's all.

"Take 50% of the money . . .

"Only they won't put . . .

"What to do and how to do it . . .

"Cocksucker . . .

"Yeah . . .

"They look at you like you are a fucking . . .

"If I had a half-million dollars in the joint . . .

"He always jumps out of the net . . .

"This is what I warned him not to do . . . He didn't want no publicity. He doesn't want to even call it a key club. Don't you understand . . .

"This is what . . .

"Not enough . . .

"It is an out and out . . .

"Mr. Berger . . .

"There is something about the law here, about the gift shops, see, whether it is their gift shop or whether it is leased out . . . no souvenirs . . .

"Caught in between . . .

"What are you talking about?

"There is something about the gift shops in the law.

[fol. 962] "Which law?

"The State of New York.

"Everybody has . . .

"I understand it. So the lawyer called and this is what I asked him. He is talking about cigarettes, whether the, leasing the, whether they are holding it, you know, even gifts . . .

"You know what they are doing with that?

"Huh?

"You know what they are doing with that?

"No . . .

"You give him a half a minute, he'd get a piece of advice. I don't even want to go in partners. Why should I break my balls, you know, in, for them. For what?"

(At this point somebody was humming a tune.)

Mr. McKenna: In effect, Mr. Brill, you are hearing this entire tape.

Mr. Brill: Hearing what tape? I can't hear anything.

Mr. McKenna: No, it is not being shut off. I am just showing—There is something else on the tape. They are out of the room.

Mr. Brill: Unintelligible sounds.

Mr. McKenna: But you wanted to hear the entire tape.

The Court: I am going to rule on your motion as soon as you cut that off.

The Court has heretofore reserved decision on the defendant's application that the entire tapes be run off. I now grant that motion. I think that, in the interest of all concerned, we should have a re-run on Tuesday at two-thirty. I'll direct that no trial session be had that day, and at that time we should have a transcript of this last recording, which was not ready today.

[fol. 963] Mr. Brill: Could we get one or two things for the record? Could we have the line at which this ended today, right now, this tape right now.

The Court: You have it, 736 I guess it is.

Mr. McKenna: Yes, we stopped at—

Detective Feely: I stopped it at Line 348.

Mr. Brill: May I ask Your Honor, and please don't misunderstand this request, to direct the court reporters to refrain from conversing with each other on the basis of the transcripts and to refrain from referring to each other's notes on transcripts?

The Court: Well, I had intended, very frankly, to have them re-run with earphones so that perhaps there will be better audibility.

Mr. Brill: Well, we still have these transcripts to deal with.

The Court: I will reserve decision on your motion. I will at this time direct that the Court Reporters make no transcription of the recordings until I have ruled on the defendant's request that the reporters do not confer amongst each other in making their transcripts.

Mr. Brill: Well, it will disable me considerably not to have whatever may be regarded as transcripts, because I had counted on addressing a motion to the Court with respect to these tapes.

The Court: You will have a ruling on it tomorrow.

Mr. Brill: All right. Very good, sir.

The Court: That will give you ample opportunity to make your motion.

. . . . .

(Whereupon, at 7:40 p. m., the trial of the case of People v. Ralph Berger was adjourned till Friday, October 16, 1964, at 11:15 a. m.)

[fol. 964]

MINUTES BY STENOGRAPHER MICKELL, OCTOBER 20, 1964

• Indictment No. 1402-63.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special and Trial Term, Part XXXVIII

---

THE PEOPLE OF THE STATE OF NEW YORK

against

RALPH BERGER,

*Defendant.*

---

190 Centre Street,  
New York 13, N. Y.,  
October 20, 1964.

Stenographer's Minutes of Proceedings During Second  
Preliminary Playing of People's Tape Recordings at  
Which Time Listeners Were Wearing Earphones.

Michael J. Mickell, C.S.R., Official Stenographer.



[fol. 965]

Indictment No. 1402-63.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK  
Special and Trial Term, Part XXXVIII

THE PEOPLE OF THE STATE OF NEW YORK  
against

RALPH BERGER,

*Defendant.*

100 Centre Street,  
New York 13, N. Y.,  
October 20, 1964,  
2:55 P. M.

Before: Hon. Mitchell D. Schweitzer, J.

Appearances:

For the People: Jeremiah B. McKenna, Esq., and David A. Goldstein, Esq., Assistant District Attorneys.

For Defendant: Joseph E. Brill, Esq., and Bernard J. Levy, Esq., 165 Broadway, New York, N. Y.

(Mr. McKenna, Mr. Brill, and the Defendant are present.)

Mr. McKenna: I now have No. 1. You want to review that and we will go chronologically.

[fol. 966] The Clerk: Continuing the trial of the People against Ralph Berger.

The District Attorney, the defendant, and his counsel are present.

Mr. Brill: Have we got the reel number on this one?

Mr. McKenna: 5483.

Mr. Brill: 5483.

(Thereupon, Reel No. 5483 was played by Detective Berkowitz as follows, and Mr. McKenna, Mr. Brill, the Defendant, the Court, and the Court Stenographers were wearing earphones while it was being played. The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...")

"Let the whole world know.

"... talk about ...

"Listen ...

"Relax ...

"Relax ...

"You wouldn't ...

"On that late plane ...

"Maybe you will have dinner with Peg ...

"You are a very pretty girl, very pretty, pretty girl

...

"Oh, no ... (Laughter.)

"Oh, boy ... I was all set to go to Florida. I was so tired ... I never took a vacation in my life ...

"Did someone say something ...

"I am going to fly ...

"Wonderful, you know ...

"Have you been to Florida?

"No.

"Never been there?

"No ...

"You are very pretty ...

[fol. 967] "... being around ... all the time ... Her mother is ... in the house all the time ... on the road ... you know ...

"Saturday afternoon ...

"Cars ...

"How about ...

"Did you ever see one ...

"I see her once a week, but we are divorced. I see her ~~once a week~~, but I got to see her once a week ...

"I give her 700 a week ... every time ... security ... I'm not afraid to ask. What the hell do you do? ...

"Oh, well ...

"Ralph ...

"What did you ...

"No ...

"All I wanted was ...

"... he knows what to do.

"... you know what to do ...

"One has got nothing to do with the other ...

"... six months already, you know ...

"No ...

"You didn't discuss her ...

"I don't know whether he did or not ...

"Yes, but I am going to be a nice fellow now.

"What the hell's the difference ...

"Ralph ...

"You're right, Ralph, you're right ...

"This kid hasn't got ...

"It is so hard. Look forward? We may never get this money. I don't know where the fuck ...

"You can't ...

"What do you do with a guy like this ...

"Hello.

"Yes.

"Yes, Bill.

[fol. 968] "How are you, sir? ...

"Yes ...

"Mr. West ...

"I told ...

"Sure ...

"... that's all.

"What happens to him? ...

"This is the ...

"This is the thing . . .

"You know, after all . . . because . . . worried . . . I don't know. I did what she wanted.

"This is what you are asking me to do. You are asking . . .

"No . . .

"Hello

" . . . two thousand . . .

"One hundred dollar bills . . .

" . . . you know how . . .

"Oh . . . \$110,000 mortgage . . . Ralph . . . using . . . How clear are you? . . .

"That's all . . .

"What did you use to do it? . . .

"Cocksucker . . .

"Two hours ago. This is . . .

"Warned us not to do; didn't want no publicity; he doesn't . . . do you understand? . . .

" . . . the State of New York . . .

" . . . whether it is a good job . . .

"What are you talking about? . . .

"With the Lord . . .

"You don't know . . .

"We don't know . . .

"No, no . . .

"I don't even want to know. Why should I break my balls, you know, for what? . . .

(At this point some singing is heard.)

[fol. 969] (At this point the tape continued playing, but the Court Stenographers were instructed not to listen to it.)

" . . .

"You don't understand. I don't give a darn . . .

"You don't understand.

"Well . . .

" . . . Just a minute . . . I'll tell you that . . .

"...no.

"Tell her to forget my number. I don't want her to report . . . and I have got it all hooked . . .

"I was willing . . . Everybody has done what they wanted. It's a joke and I hope . . .

"Well, I'll have to order it . . .

"Let them pick up what they can and I will pick up what I can . . .

"That is the word and that is the way it is and this man ain't going to go and . . . I worked too hard for this. Let me tell you something. This was the toughest thing I have encountered. This was almost . . . You remember. And, I mean, if I don't hear . . . from you people at this point . . .

"All right. Okay . . .

"Hello.

"No good.

"It's wonderful . . .

"The guy is . . .

"This man . . .

"I think you could be a linotypist . . . a guy . . . You and three wise guys . . . I swear . . . You know, I'm not bullshitting. I mean it. Serious? This is a good, serious thousand dollar thing . . .

"Yes, \$15,000 for . . .

"He got \$15,000 apiece. Now . . . what good is it if I don't give a damn? . . .

"Because the lawyer . . .

"One hundred thousand dollars . . .

[fol. 970] "And I'm not . . .

"I never did that in my life, never . . ."

Mr. McKenna: Now, there is some reel left before we begin Transcript No. 2 as to the money." Does Mr. Brill want to listen to that for the question of authenticity? I am perfectly willing to play it.

Mr. Brill: My position, Judge, is that with respect to the matter of authenticity, they must establish affirmatively

that there is no matter which would not, which this matter, which is taken out of context, the matter which is being offered by the District Attorney.

Mr. McKenna: Well, my detectives will testify to that.

Mr. Brill: I haven't finished. As I suggested the other day, to segment this matter in such a way as to select that which you want to offer—I am now addressing myself through the Court to the District Attorney—on the basis of asserted relevancy or audibility, particularly in the light of where there are so many gaps in the tape itself and in the transmission of it as we heard it last Thursday without earphones and as we hear it today with the earphones, there are areas which are garbled, which are incomprehensible, which are inaudible, which are unintelligible, and where there are distinct gaps; and in one instance I recorded the time to be from 3.12 to 3.17 where during this conversation, which is allegedly being had in the offices of, I take it, Mr. Steinman—is that right, Mr. McKenna?

Mr. McKenna: Yes.

Mr. Brill: —not one word came over this tape; and to take a gap of five minutes without affirmative proof that there was nothing said which would be in context with respect to this tape which was not exculpatory, which did not change the impression which one might get from the tape as we hear it today with the aid of earphones, is to be unrealistic and to say that we will accept something out of context, garbled as it be, as it is, and having the [fol. 971] other characteristics which I have described, all of which are undesirable characteristics and which render the tape untrustworthy and unreliable, and upon the contents of which no jury should be permitted to speculate. This is in the nature of a preliminary statement as indicating the areas within which I will address to Your Honor a full motion urging that the tapes be excluded. I have not yet prepared myself fully on the matter, but I think off the top of my head that I have given some indication as to what the situation is.

Mr. McKenna: May I be heard, Your Honor?



I think the five-minute gap that Mr. Brill is referring to is fairly obvious what it is. You heard footsteps receding into the distance. Somebody left the room and then there were noises coming from an outer room. I can't vouch that what was said in the outer room wasn't exculpatory. All I say is that somebody conversed at that point and we heard the footsteps coming back into the room and we heard the conversation resume. I think it is a question for the jury. They listen to the sound, the tenor of the voice, and determine whether this is a natural pause in the conversation.

Mr. Brill: This is an interpretation which the District Attorney now offers.

Mr. McKenna: From the footsteps.

Mr. Brill: There is nothing in the tape from which one would have the right to conclude unequivocally or proven that these were footsteps, or even that anybody left the room. It is just as clear that the people were in the room and were having conversation that was not actually being recorded. Certainly, it was not transmitted here today, not as I recall it, and it would have to be strictly on the basis of recollection, because I did not have what purports to be a transcript last Thursday of this particular reel at the time when Your Honor had this preliminary dry-run.

[fol. 972] I urge upon Your Honor the unreliability of this tape. It contains or it fails to demonstrate that it contains everything that was said with respect to any of the particular matters concerning which the District Attorney would seek to have it admitted and for which purposes the District Attorney would seek to have it admitted, and in these circumstances, it seems to me that to permit the jury to speculate upon whether or not anybody was left in the room, whether or not anybody walked out of the room, whether or not anybody had or had not said anything beyond what the tape purportedly says was said, is of such a highly speculative nature as, in essence, to create confusion and to deny to the defendant a fair trial.

I know that Your Honor has indicated that I will have a full opportunity to make a full motion with respect to the matter.

The Court: I feel that I am not called upon at this time to make any ruling.

Mr. Brill: No, sir. That is correct. I am merely indicating for Your Honor's thinking areas in which I regard that the tape should be excluded, not only on the grounds of audibility, but also because, even assuming that some of the criteria with respect to the mechanical aspects—the competency of the, its having been manufactured or prepared, the competency of the operator at the time that it was made and the chain of possession, assuming those criteria to be proven upon the presentation of witnesses, I respectfully submit to Your Honor that the other criteria which must be taken into account by a court in determining whether or not the tape will be admitted or any tape will be admitted, fall far short of the level of proof required to demonstrate that the tape has reliability and trustworthiness to the degree that a jury should be permitted to have it.

The Court: Let's proceed with the next recording.

Mr. Brill: Now, Judge, can I understand what we are talking about offering at this particular session? Not that [fol. 973] I am consenting to any of it; it is not to be misread that I consent to the reception of any part of this, but Mr. McKenna has indicated that he didn't intend to offer all of this tape.

The Court: Can't you do that at the conclusion?

Mr. Brill: Yes, sir, we certainly can, we certainly can.

The Court: I thought we set out to do one thing this afternoon, that is, to hear the four recordings.

Mr. Brill: May I at this time—excuse me.

The Court: And maybe you can confer with Mr. McKenna with respect to what parts he will consent to delete.

Mr. Brill: I don't want to do that, Judge. I don't want to be in a position where anybody will be in the position to say that I consented to the deletion of any particular

portion or segment. My objection goes to the whole of the tape and certainly to the whole of what is clear now to be an inaccurate transcription of the tape, at least of the one we heard.

The Court: Before you leave that area, I want the record to be crystal clear that you are, in any event, being afforded the opportunity at this time to make any motion you feel advisable to delete any incompetent matter in this recording which we have referred to as Recording No. 1.

Mr. Brill: Well, I realize that Your Honor has indicated that I have a right to make motions, and I don't think Your Honor means to limit me to making a motion to delete. My motion will be addressed to the entire tape.

The Court: That will be your choice.

Mr. Brill: Yes, sir, it will be a choice.

Well, I will hold what I was about to say with respect to others.

The Court: Let's proceed with the next recording, which I believe is Reel 5483, re-recorded on Reel 5899.

Detective Berkowitz: This is the original.

Mr. McKenna: We are playing the original, Your Honor.

Mr. Brill: In each case?

[fol. 974] Mr. McKenna: Yes, sir. Yes. You will notice for the record—

The Court: Are you playing Reel No. 5483 next?

Mr. McKenna: That's right, we are.

The Court: Proceed, please.

Mr. Brill: There are two reels of that, I think, aren't there?

Mr. McKenna: Just for Mr. Brill's edification, 5483 is a reel that was used both on June 28 and June 29. The first tape which we just played is 5483. The conversation occurs June 28. This is the following morning. It is the same tape.

Mr. Brill: Just so the record is clear, is it Mr. McKenna's representation that the commencement of this tape takes on at the end of the one which was just played and which we now identify as being Tape No. 1, Reel 5483, of June 28?

Mr. McKenna: No. That is not what I said. There is extraneous matter after the last conversation we heard and before this conversation. I will play it for Mr. Brill so that he may determine whether there is any exculpatory statements in there which he may want to use. Our position is there is nothing in there that is relevant. We have no intention of offering that portion of the tape. But in view of Mr. Brill's objection, I will play it for him after we conclude this session so that he may determine if there is anything there he wants to use.

Mr. Brill: This is like Greeks bearing gifts, Your Honor. This is the kind of offer that is meaningless.

The Court: Let's proceed.

Mr. Brill: I don't want to say anything in derogation of what Mr. McKenna's honest desire and intention may be, but it seems to me that to suggest that he and I should get together at the end of what is in the nature of things a formal proceeding had with the Court, in the absence of the jury, does violence to the whole concept of what we are [fol. 975] doing here. I don't want to make any private arrangements or agreement with Mr. McKenna. I am about to make a full motion at the proper time along the areas which I have indicated, and I expect that Your Honor will rule upon it. Mr. McKenna's offer may be generous and I don't want to be in a position to question any statement that he makes, but I am afraid that I am obliged to insist upon proof of the matters with respect to these offers rather than a representation or a statement, inasmuch as Mr. McKenna was not present on the taking of these and I don't believe he would suggest that he was.

(Thereupon, Reel No. 5483 was further played by Detective Berkowitz as follows, and Mr. McKenna, Mr. Brill, the Defendant, the Court, and the Court Stenographers were wearing earphones while it was being played. The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...")

"...

"Yes...

"Yes, sir...

"Listen...

"Why...

"For 250...

"For one...

"I turned down the 750, Frank. Neyer... he asked for more, because, since his trouble... \$750... two thousand to 750... I told him if you do real well, we will draw a couple hundred more, but right now give him 750.

"Seven hundred and fifty?

"No, 250.

"Yes.

"250, 250... and maybe... will lay it out for you.

"That is all right. I am going to lay this out for you. I am going to lay this \$500 out for you...

[fol. 976] "Seventy-five dollars...

"Is there anything I can do for you?...

"Huh?

"You're all set?...

"... you know, you have been...

"This is all shit...

"Yes... nothing important...

"... on the phone...

"Yes.

"Ralph, you think that is big enough, that split-up for five...

"... do my best...

"Ralph, who...

"Marrus...

"Nobody...

"Nobody...

"He told you that...

"... because...

"... Ralph... or you want to wait...

(At this point there is some indistinct singing.)

"... Ralph...

"I am going to go there if I have to walk there...

"We couldn't help it...

"Hello.

"Yes.

"Who's calling?

"Harriet? What happened, Harriet?...

"All right, hold on...

"Hello.

"Hello...

"Huh...

"... Harriet...

"Chicago...

"... more than one...

"I don't want...

"What is the difference?...

[fol. 977] "All right, I tell you what I'll do ... the other one. Well, I am sorry about this ... We can ... Can't do it very often ...

"Jules?

"Yeah.

"Hello.

"Yes, Don ...

"Harry ...

"Good. How are you?

"Oh, operator ...

"Harry ...

"... no ... so he wouldn't have to be up ...

"... the hotel here. Is it one boy?

"I have an office in there—one boy, 15 employees.

"Well, this is the first time that I have ever ... reservations.

"Yeah ...

"This is not our ...

"This is ...

"We don't have to put the money up. He does ...

"Say, George, you want to talk to Mr. ... now?

"You want to meet me down there tonight?



"What time? . . .

"It will be the other . . .

"Yes . . .

"No . . .

"Well . . .

"Yes, yes . . .

" . . . thousand dollars . . . a lot of dimes . . .

"Who?

"Where are you going . . .

"Yeah, yeah.

"All right?

"Yes . . .

" . . . stand-by . . .

"I don't know . . .

[fol. 978] "Ring the bell . . . because . . . Idlewild . . .

"No . . .

"What is the difference, you can . . . cab driver . . . tunnel . . .

"What tunnel? . . .

" . . . Listen.

"Yes . . .

"No, but I mean . . . you can't . . . you got four lousy . . . long week end and that is the life.

"What will I do about . . .

"Okay. All right . . .

"All right . . .

"Two hundred dollars . . . Goldberg . . .

"Yeah . . .

"Yeah . . .

" . . . George, tomorrow night . . .

"Split up the money . . .

"Yeah.

"They don't want to lose this. They are looking . . .

"Two thousand dollars . . .

"I'll see you tonight.

"Good luck.

"Good luck . . .

"I have it, but if you need it, I'll give it . . .

"Fifteen hundred . . .

" . . . one thousand . . .

"I am going to lay out the 500 . . .

"Ralph, I can't help it. I am this way . . .

"If the guy . . . I will get after him for you . . .

"I mean . . .

"For \$50,000 . . .

"Give him fifty . . ."

Mr. McKenna: You want to put on 5517.

Mr. Brill: With respect to this reel, Your Honor, the purported transcript which has been handed to the Court and counsel indicates that a portion, if not all, of this [fol. 979] eavesdrop conversation was had on the telephone, and I respectfully submit to Your Honor that the provisions of Section 605 of the Federal Communications Act prohibit, in the conjunctive, the interception of a telephone communication and the disclosure thereof. I take it that this dry-run is intended to apprise, with earphones, is intended to apprise the Court of what will be offered to the jury in open court, at which time I assume that it would then be regarded as a disclosure thereof, inasmuch as it may be argued that this posture of the case, where it now stands, is not a disclosure, inasmuch as Your Honor is in a position to or is being placed in a position to rule on its admissibility. Nevertheless, I urge that the public policy of the State of New York is that the courts should not be parties to the commission of Federal offenses, and that to admit the conversation obtained through the interception, whether by eavesdropping or any other method, and the disclosure thereof in open court, constitutes a violation of the public policy.

Mr. McKenna: Just for the record, Your Honor, I believe Mr. Brill is urging that the portion of the telephone conversation, namely, one half of it, that is recorded on an eavesdropping device installed in the room where the telephone is located, constitutes an interception

of that telephone call. I think this is a silly position. We have not intercepted the call itself. We don't know who is on the other end. It is just that one party to the call is talking, and while he is talking, his conversation is being picked up on an eavesdropping device. This does not constitute illegal wiretapping within the definition that Mr. Brill is using.

Mr. Brill: Your Honor doesn't want to hear further argument at this time?

The Court: You may proceed.

Mr. McKenna: The next one is Reel 5517. The date of the conversation is June 29, 1962. The time is 4.46 p. m. [fol. 980] The Court: Will you take a two-or-three-minute recess. Let's take a recess for a few minutes.

(Thereupon, at 3.55 p. m., the Court declared a short recess, and the proceedings resumed at 4.10 p. m.)

---

#### After Recess.

The Court: You want to step up just for a moment, counsel, please.

(Off-the-record conference at the bench among the Court, Mr. McKenna, and Mr. Brill.)

Mr. McKenna: Your Honor, for the record, this next recording is on Reel 5517, a recording of a conversation that occurs on June 29, 1962, and the time is approximately 4.46 p. m.

(Thereupon, Reel No. 5517 was played by Detective Berkowitz as follows, and Mr. McKenna, Mr. Brill, the Defendant, the Court, and the Court Stenographers were wearing earphones while it was being played. The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...")

"Hello, Al, how are you?

"Pretty good.

"What's new?

"What's new with me?

"Well, we'll . . . what is . . .

"Huh?

"Oh.

"I still . . .

"Yeah. He says you have been talking.

"Yeah.

[fol. 981]. "Monday morning, Tuesday morning.

"What time

"Any time in the afternoon?

"How about in the morning? How about at ten o'clock?

"About ten o'clock?

"I don't see . . .

"Before night . . .

"Okay.

"Good enough.

"All right. All right.

" . . . he is talking . . . up there . . .

"You haven't got the right to sell in a private key club . . .

"You are not supposed to sell private . . .

"Public . . .

"Yes . . .

"I got five, I got four . . .

"Crazy . . .

"Your old man wouldn't . . .

"Have a special conference . . .

"Joe didn't come up at all . . .

"Conference . . .

"Nothing . . .

"The only way I can go to these people and say . . .  
That is the only way . . .

" . . . he said there . . .

"I am going to do that . . .

"It was done . . .

" . . . you're asking . . .

"Well, it is the worst one . . ."

Mr. Brill: Is that the end of that tape?

Mr. McKenna: No. There is one more conversation.

Mr. Brill: Pardon.

Mr. McKenna: One more conversation.

Mr. Brill: No. I say is that the end of that tape on Reel 55—

[fol. 982] Mr. McKenna: That is the end of that conversation. There is another conversation on the same tape.

Detective Berkowitz: Very short.

Mr. McKenna: Yes.

The Court: While he is fixing that, Mr. Brill, may I see you for a moment, please, and Mr. McKenna.

(Off-the-record conference at the bench among the Court, Mr. McKenna, and Mr. Brill.)

Mr. McKenna: Conversation of June 29, 1962, Reel No. 5517. The time is 5.15 p. m.

(Thereupon, Reel 5517 was further played by Detective Berkowitz as follows, and Mr. McKenna, Mr. Brill, the Defendant, the Court, and the Court Stenographers were wearing earphones while it was being played. The omission of matter which was indistinct to this Court Stenographer is indicated by three spaced periods, thus: "...").

"What time will you be in Monday morning, Ed?

"All right, I'll be there ten o'clock.

"Call me on the phone. Call me on the phone ten, ten-fifteen, long distance, and I'll come back.

"All right, Harry . . .

"Now . . .

"Yes, yes . . .

"Yes . . .

"I found out one thing . . .

"Yes . . .

"Harry, I'll see you ten o'clock Monday morning . . .

"Just a moment . . .

"All right . . ."

Mr. Brill: Apparently, Your Honor, all of this is a telephone conversation and it seems that attributed to, or the purported transcript attributed to, the voice identified [fol. 983] as Berger are statements which, obviously, if you can make out what they are saying, are uttered in two different voices.

Mr. McKenna: No.

Mr. Brill: Excuse me. You—

Mr. McKenna: I mean, you are not stating it correctly. It is Steinman and Berger on a telephone.

Mr. Brill: Well, I am referring to that portion of this purported transcript which begins with that attributed to "Berger," "And the toes go up," etc., down to, "What good did it do him eventually?" all of which, on the purported transcript, is attributed to Berger, and even a neophyte could determine, and even though it would be unintelligible and inaudible and incomprehensible, that there are at least two voices in the course of that discussion which is had on the telephone, which conversation was intercepted and the disclosure of which would constitute a Federal crime, could tell that there were at least two voices on that. I point that out to Your Honor for your consideration in connection with the eventual motion that will be made, and Your Honor's obligation.

Mr. McKenna: Your Honor, Mr. Brill keeps reading things into the record that don't seem to be accurate. There were no two voices as far as I could determine, and Harry Steinman was humming during the period of the time that Mr. Berger was talking into the phone.

Mr. Brill: I have been practicing law 35 years and nobody ever said yet, until Mr. McKenna made the suggestion, that I ever said anything deliberately that was inaccurate.

Mr. McKenna: I am not saying "deliberately."

Mr. Brill: And I am going to ask Mr. McKenna to apologize.

The Court: Mr. Brill, the word "deliberately" wasn't used. He used the word "inaccurate." Now, we can do



that inadvertently, and I am sure that is the only sense in which he intended to use it.

[fol. 984] Mr. McKenna: Well, that is the extent of the tapes we intended, Your Honor, to offer.

The Court: We will adjourn until tomorrow, eleven-fifteen.

Mr. McKenna: Wait a minute.

Your Honor, I am making an offer on the record that these tapes are available to Mr. Brill to listen to the entire thing, if he so wishes, in order to determine if there is any material in there which he feels he could exploit to show, let's say, his client's innocence, or exculpatory matter. I want the record to show that.

Mr. Brill: This offer is meaningless. It doesn't detract from the offer made by the District Attorney to offer segments which are garbled, unintelligible, incomprehensible, and in many places completely blank.

Mr. McKenna: That is your version, Mr. Brill; that is not mine.

Mr. Brill: We will see what the versions are.

Your Honor, I think that we might well hold in abeyance until we get all six of the transcriptions from the official court reporters the motions that I will address to the tapes.

Mr. McKenna: By the way, Your Honor, I don't think the Court Reporters should be limited to one hearing. I think they are getting this cold, Your Honor. They have had no voice identification or anything like that. They should be able to listen to it two or three times, or as much as necessary in order to get the accuracy—

Mr. Brill: That is exactly—Excuse me.

Mr. McKenna: Well, let me finish.

They are talking at a rate which is fast, Your Honor and it is not speed that we would get in courtroom testimony, where we could slow a witness down if he spoke too fast. So I don't think the court reporter should be bound by the speed of the conversations of the two people speaking on these tapes.

[fol. 985] Mr. Brill: The suggestion made by Mr. McKenna is directly at variance with what the courts have held. The courts have said that transcripts which are the result of repeated playings are suspect; they should not be permitted to get to the jury, nor should they become a part of the record here. These are certified stenographic reporters, qualified to take whatever is said.

The Court: We will adjourn now until tomorrow at 11.15.

(Whereupon, the trial of the case of People v. Ralph Berger was adjourned till October 21, 1964, at 11.15 a. m.)

[fol. 986]

MINUTES BY STENOGRAPHER MERSHON, OCTOBER 20, 1964

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special and Trial Term, Part 38

THE PEOPLE,

against

RALPH BERGER.

New York, October 15th and  
October 20th, 1964

Before: Hon. Mitchell D. Schweitzer, J.

Proceedings Taken Without Presence of Jurors Relating  
to Certain Eavesdropping Recordings in Above-Named  
Case.

Reginald C. Mershon, Official Stenographer.

New York, October 15, 1964.

(The following is a transcript of the proceedings held, *in camera*, in the above entitled case, on the above entitled date, in so far as the Official Stenographer, Reginald C. Mershon, was able to hear and understand the proceedings, which were played from tape recordings. The symbol . . . (three dots) is used in this transcript to indicate omitted matter intervening which could not be heard by the Stenographer.)

[fol. 987] 4.15 P. M.

(Start of tape recordings:)

Good morning.

Good morning.

I'm sorry I'm late.

Yes . . .

All right, listen—what . . .

As long as it's your name on it . . .

Oh, good . . . I have something . . . 250 . . .

Make sure you keep Brownie in the background, at least for once.

Yes . . .

So we'll get this monkey straightened out . . .

Harry turned down 750, Frank, he asked for money . . . he says, 'Look, he's in trouble, he is going to get 750 . . . from two thousand to 750 . . .

Have to wait around here . . . I told him if he does real good you will throw him a couple of hundred more, but right now give him 750, that is your obligation.

Could we make . . . no . . . 250, you've got to give him 500 in cash.

I know, you don't have it now, but I am going to give—I am going to lay it out for you. I am going to lay this five hundred out for you . . . 750 is enough for him— . . .

Count it while he is here, don't make a mistake . . .

Is there anything I can do for you?

What?

Are you all set, got everything?

Yes.

What?

I've got a few things . . .

You know you can pick up . . . this is all chips . . .

It is nothing, do you know the people? . . .

Ralphie, do you know the people . . . do you think that is big enough, that set up . . .

[fol. 988] I saw him again yesterday . . .

That is the only way I can see that you could really get your money back.

Well, I will tell . . . I deal with . . .

Actually you are partners.

Actually, yes.

Nobody, nobody . . .

I know they got your money . . . if that means he has any, he tells me . . . as of now and as of this year, I am the only one that has got it . . .

Ralph, you want to discuss that with the guy today, or do you want to wait?

What . . .

(Sound of humming on tape.)

That will be five and one . . . and two and ten . . . 75—  
 . . . now wait, I will be back here at 12, 1 . . .

O. K., good . . .

From where?

I am going out to my car . . . to the hotel . . .

Why don't you let a man look out for you, Ralph?

I will straighten myself out, all right.

Are we going to stay here that late?

I don't want to go there until after lunch . . .

Might be some plane reservations . . . in a few minutes . . .

Think of something and maybe we can help you with it now.

I am just sorry about the whole thing, I couldn't believe it . . . This is the first time we had word . . . that's right . . .

The only thing I said, and I meant it . . . I'd go across the street to get help for you, that is the only thing . . . I thought you'd give it to him . . .

Hello? Yes, who is calling? Harriet.

What happened, Harriet?

[fol. 989] We'll have a good time—well, have a good time, you'll need something for it . . . hold on . . .

Hold on . . . American Airlines . . .

I couldn't believe it, I must have made forty or fifty calls to Chicago . . . thank God he is not charging it on my phone . . .

How about Brownie . . . you can't depend on it . . . he is a nice guy . . . 11:30, that is all . . .

Haven't got a thing today, at all . . .

What time?

The only thing is . . . tell you what I will do, put me out as a standby on the other one. We will talk about it, put me on the other one . . .

Not until we paid it off . . .

Chicago, 111 North Wabash . . .

Only weapon you've got . . .

Hello?

Yes. Hey, George . . .

Good, how are you?

Oh, operator, what are you putting me through there—very good . . . a reservation . . . all those questions . . .

No, the reason George he find he give him the reservation a week ago. He would not have to put it through . . . you what?

The whole thing here is at 148 East 28th Street, I have an office there. Yes, sir, at 14 East 48th Street, I have an office there . . .

Well, this is the first time that I have ever been hearing about an investigation to get a reservation . . . yes . . . all right.

That is not his opinion, we don't have to put the money up, he does.

What airline are you calling . . .

Hey, you want to talk to him, that is your privilege, you know . . .

Do you want to meet me down there tonight?

[fol. 990] What time?

And I think Ralph finished the whole thing, Ralph, he says, talk to him— . . . I think he will come across . . .

Listen I am calling to . . . I get that bag money, I'll bring it down . . . yes . . .

Wait a minute five hundred and fifty in bag . . . What?

I can't carry it a lot of dimes, a lot of dimes . . .

Are you sure? Hello . . . not dollar bills . . . why dimes . . . go ahead.

I got to get . . . I feel rotten . . .

Have we got a standby, or something?

How about that, what did you call that . . . get that, six o'clock . . . the other one was four o'clock.

What about it? Stay there, it's all right . . .

I want to go to Idlewild.

Take a taxi, it will cost you . . .

What is the difference, you go from the hospital to 42nd Street, sixty-five cent cab ride to the terminal.

What terminal?

East Side Terminal . . . no west side . . .

You got four something in change . . . he is figuring for a long week end, Friday, Saturday, and Sunday, that is a lot of change.

What do I do about Friday? How much . . . o. k., all right . . . a lot of singles, more than anything.

More singles . . . so I will get—

I am going to need George tonight, he has got a guy . . . I will be down there in about an hour and a half.

We will get to the old man first that wanted to put up the money for the show . . . o. k.

Get there first, they don't want to lose this, they are looking at sixteen hundred a week for eight weeks, or more, you know . . .

But I will get this . . . the only thing . . .



I will see you Sunday, good luck . . .

I have it, but if you need it I will get it . . .

[fol. 991] I will give it to the kid . . . you know what I think . . .

I am going to lay out the five hundred.

Do you want to start up? . . .

Ralph, I can't help it, I am that way, don't you understand? I couldn't do it . . .

I could ask him for it . . .

Yes, I mean, I think that the guy should pay it . . .

That is the opinion here—give him fifty . . .

(End of recording.)

Mr. McKenna: Take that off and we will go to the next one.

Mr. Goldstein: That is 5517—5517—that is what you are playing now?

(Starting of recording:)

Hello, how are you?

" Pretty good, what's new?

What is new with me? Well, we are trying to get title to the ground.

Yes, and what is that going to cost you?

What . . . oh, I am still in New York, I am leaving now.

Gee, I was going to call you . . .

Yep, Monday morning, Tuesday morning, what time?

Any time in the afternoon.

How about in the morning?

About ten o'clock.

I don't see why not . . .

Before nine, O.K.?

Good enough.

Right.

Goodbye . . .

I talked to him Monday . . .

[fol. 992] There is something about the floors up there, something about what you call a charity club license, about a thousand dollars . . .

We haven't got the right to sell . . . it is a club . . . what the hell, what do you want to call it, a club . . .

In other words, he is supposed to lease, not supposed to sell . . . not supposed to say the public can't come up there. That is what we are having trouble with now . . .

If they are going to act . . .

Pick me up at six o'clock and drive me out to the airport.

Where?

To Idlewild.

At four o'clock I've got to go . . .

Four big places . . .

We had two weeks of it . . .

We had two weeks of it . . .

What is the matter with you, are you stupid? . . .

Leave it right there . . .

He has been hollering about that, in other words, the last minute stuff . . . I tell you it will never . . . he doesn't know, he doesn't understand . . .

They are going to put up the money and then get it later, or something, but when they do business with a guy he knows one way and he does the same thing . . .

I don't think so, Harry, tell you, we might get it later . . .

Let me do it . . .

He said that he was the one, but he got eighty per cent, they got twenty per cent . . . Harry, when we get it . . .

Are you crazy, do you know where you can pick up twenty-five . . . I don't know . . . you can't take that . . .

What do they want to do?

The only way I can go to these people and say is what it is going to cost you, that is the only way. The only thing I can tell them is this . . .

[fol. 993] I am going to find out what the hell they've got on their mind . . . I told you . . . that is what is coming up . . . straighten this out . . .

What are they so worried . . . what have you got to look for . . . ask them for a bite . . .

You know, they tell the lawyers . . .

(End of recording.)

Mr. Brill: What is the number, please?

A Voice: 207, line.

(Time is now 6:38.)

Mr. Brill: As I understand it, that was Reel 5517 of the June 29th, 1962 conversation. Is that what it is supposed to be, Mr. McKenna? Excuse me, 5517?

Mr. McKenna: Yes.

Mr. Brill: I understand that you have another on the same line, later in the day.

A Voice: 5:15.

(Start of Recording:) (Inaudible—reel stopped.)

A Voice: It is going to be quite a problem to find it, I have no way of knowing where it is. I thought perhaps it might be the next conversation, but apparently it is not.

Mr. McKenna: I see. Now, where is that handwritten transcript?

A Voice: I beg your pardon?

Mr. McKenna: Is that on this reel?

A Voice: No, this one we are talking about now—

Mr. Brill: Is this 5517, 5:15 p. m.?

Mr. McKenna: Play it through until you catch it.

A Voice: The line will be 271.

(Start of recording:)

Harry, wait before you go.

What time will you be in Monday morning?

All right, I will be there at ten o'clock . . .

He said he will go there at ten o'clock.

[fol. 994] Call me on the phone at 10:15, long distance and I come back.

All right, Harry.

I had to stay over for something . . .

I am waiting for you to do something . . .

(Sound of singing on recording.)

Do you know his name?

Yes, Same, yes . . .

I don't want him to know me, you know, because I thought possibly— . . .

What are you doing now?

What good did it do?

Let's put it this way, what good did it do?

I found out one thing, there is one . . . there is only one bottle—

Harry, I'll see you at ten o'clock Monday morning.

Yes, get the matches . . . all right.

Get busy with it.

(End of recording.)

A Voice: Line 368.

Mr. Brill: Can we have the identification of this one?

Mr. McKenna: Yes.

The Court: What is the reel number?

A Voice: 5483, June 28th.

(Time of day is now 7:12 P. M. Reporter's note.)

A Voice: Line 27, roughly.

Mr. Brill: All right. Time is now 7:16.

A Voice: I should go back a few words, be about here, line 22, I think, would be better as the line number, 23 actually. I beg your pardon.

Mr. Brill: 23?

A Voice: Yes, sir.

(Start of recording:)

Did they push you around?

Around?

Push you around?

[fol. 995] Nobody pushed me around.

Going to push you around?

Who? ...

Hey, is that all?

No, what do you think happened?

What happened here, anything?

The kid's got it in his hand, he's on his way up.

What you going to do now?

Wait ...

He is on his way up ...

Probably Brownie is running after them ...

You're joking.

Talk to him.

But Frank talked to him here from New York.

I was waiting for Frank to know if Brownie is coming ...

Well, the most important thing, the kid's got the paper in his hand ... tomorrow night let's celebrate.

All right, I'll be in with my gang.

So, I'll be talking to you later.

All right. Goodbye ...

Sure, sure, we'll talk and I'll give you, you know, the reservation ... everything, the whole world, Harry ...

It's silly on his part to talk about sending him down there.

I mean, this thing is ridiculous.

He is going to make the trip.

But it looks silly, how is he supposed to ...

He will take the money but he don't make the trip ...

Crucify the guy ...

All of a sudden there is a leak there.

Listen, you relax and make yourself at home because you are going to be around here a lot. Relax, do you hear, relax. You know, be free to talk, do what you want to.

I just want to get rid of one thing, this Ralph that we're waiting for— ...

[fol. 996] Thank God, everything is all right ...

Ralphie, you going back tonight then?

Probably midnight.

On that late train.

Maybe, you'll have dinner here with Peggy and Jackie and I, if you could stand us another evening.

Yes . . .

She is cute.

Happens to be a pretty girl, very pretty girl.

Did you ever have any pictures . . .

Well, once . . .

Boy, if I don't take a vacation soon. I was all set to go to Florida for a few days, I was too tired. I never took a vacation in my life. I go to Europe three times a year but it is always business, so last week I said: "I am going to Florida." Thursday, I will be there, Friday, Saturday and Sunday.

Wonderful.

You know, Thursday morning I wake up . . .

You going to fly . . .

She's got a mouth, blabber mouth . . .

From being around show people all the time, and her mother is a name in show business, you know, and around these people that are in the house all the time. She was, on the road, she was a year and a half travelling with a show, you know. You'd be surprised, it's better than school for these kids.

This is different . . .

I said: "Honey, I am busy tonight, tomorrow is Friday afternoon. Why don't you go to the beach, you have got the car?" . . .

Be there at one o'clock . . . Thursday we made arrangements. I go to see her, today she want . . .

Like that once a week . . . I see her once a week, but I got to see her once . . .

Would you say she is spoiled? . . .

[fol. 997] He is such a miser with his money, puts it away in the bank . . .

She goes to private schools. Every time the kids have a birthday, exchange gifts and things . . . when she goes to the store to buy something for the kids . . .

Years ahead of them . . . unbelievable . . .

You talk to them . . .



Next week we'll be out of here . . .

Do the best you can until later on, you know . . .

Who else you going to see?

I don't have to see anybody else.

You probably know, when it comes to that . . .

It was all taken care of last night, all I wanted was a letter. I said go and get the girl, who else can you get but the girl? She has got instructions, she knows what to do . . .

One has nothing to do with the other . . .

Get together tomorrow, have a party . . .

Get over there tomorrow . . . tonight . . .

Been open for six months already, you know . . . Put the phone in Wednesday . . .

You didn't discuss money, or nothing?

We didn't discuss . . .

I don't know whether you did, or not.

I was going to tell him that the lawyer . . .

Well, I will tell him . . . what is the difference, I told him a thousand more . . .

But I'm going to be a nice fellow now . . .

Take the other two fifty, what the hell is the difference, a thousand dollars isn't going— . . .

You are right—you are wrong . . .

Ralph, you are right, let me explain, let me explain something. It is not your fault or my fault, but let's get . . . he hasn't got hit so hard . . .

Give Ralph a little bonus, you know.

We may never get this money . . . where the fuck is he going to get it?

[fol. 998] What do you do with a guy like that?

He is taking a thousand, he will knock you . . .

Hellö . . .

Yeah, how are you . . .

I told . . .

What did you say to him?

Very nice, the sister was, her kid, you know the kid, that is all.

Tell us what happened?

The District Attorney, you know, shit with them . . . scandal, what you call it . . .

For what reason . . . this man . . . you know . . .

It is a bad situation, her sister is very worried . . .

So?

I don't know.

She says she doesn't know. Bull shit, you know . . . I did what she wanted me to.

What did she ask you to do?

Asked me to do it, I did it.

She is going to get him, no threats, no muscle, nothing like that . . . the District Attorney has got it . . . it is just a bad thing, so everybody gets hurt, but it is me is going to wind up with . . .

The lawyer wants a thousand bucks, two thousand . . .

Two thousand more . . . who is that . . .

Asked for a couple of thousand out of the— . . .

Do you think he would stand and argue . . .

This man I am talking about . . .

Harry's got a hundred and ten thousand and go in the shit house . . .

If he works this right . . .

The money is coming in, that is all.

That is all . . .

Fifty per cent of the money . . .

So they have no beef . . .

What to do and how to do it . . .

[fol. 999] You're fuckin' me. If I had three and a half million dollars I would take this fuck and say, I swear to you . . .

He will fall out of the bed, he will jump out of the bed . . .

Didn't say nothing, only they are opening October 11th.

This is what he warned them not to do. Listen to me, he doesn't want them to even call it a key club, don't you understand, this is what it is . . . it is an out and out establishment of the State of New York . . .

This is the way he explained to me, you can't open if you have a five or six . . .

Do you have a car ...

Ten after two ...

There is something about the law here, the gift shop, see ... whether it is their gift shop, or whether it is something else ...

They sell souvenirs ... I mean, it is in the Club ...

What are you talking about?

Something about the gift shop.

Yes?

In the law—

Which law?

The State of New York ...

Well, everybody has that right, I understand that, but the lawyer called. This is what he asked him, we are talking about cigarettes, whether leasing it, holding it ...

You don't know what you are doing with that ...

Give him a million, give him a half a million, if he would give him a decent spot ... I only want to go and talk to the cock suckers ... you know, I can ... why should I make ...

(Sound of humming on recording.)

(End of recording.)

The Court will adjourn until tomorrow morning at 11:15 A. M.

[fol. 1000]

New York, October 20th, 1964.

(Start of recording, time of day 3:00 P. M.)

... The whole worlds, it's silly on his part, talking about ...

Listen, make yourself at home, there is plenty around here, relax. Do you hear, relax ...

Ralph, are you going back tonight?

Probably tonight ...

She is cute, she is cute ...

Happens to be a very pretty girl, very pretty girl ...

Oh, boy, I was all set to go to Florida a few days, but I am too tired. I never took a vacation in my life. Everywhere I go, if I go to Europe this time of the year it is always business.

If you want to fly it is wonderful, you know . . .

Are you going to fly? Ever been there . . .

You know, briefly, from being around show people all the time, and her mother, she is in show business, around people in the house all the time . . . she is on the road, a year and a half travelling with a show, you know. You'd be surprised, it is better than school for these kids . . .

Tomorrow afternoon is Friday, why don't you get the car? . . .

I got see her . . . the day she wants . . . but we're divorced. I see her once a week, but I have got to see her when she wants. Would you say she is spoiled? No . . .

She handles it well, I give her fin every week, every time the kid have a birthday and so on . . . believe me when he goes to the store to buy something for the kids . . .

(End of recording.)

Mr. McKenna: It is starting up again. 3:20.

(Start of Recording:)

There is no taking care of last night . . . all I wanted was a letter . . .

[fol. 1001] What about the girl?

She has got instructions, she knows what to do.

What do you want to do? . . .

One has got nothing to do with the other, don't worry . . .

All right, they didn't discuss no money, or nothing?

They didn't discuss anything.

I don't know whether you did, or not . . .

I wasn't going to tell him.

Well, I will tell them.

Get a thousand dollars . . .

What is the difference, I told them a thousand before.

Yes, but I am going to be a nice fellow now.

Take the other two fifty, what the hell is the difference . . .

But, Ralph, you are right, you are not wrong. Ralph, you are right, but let me explain something, let me explain something . . .

It is not your fault or my fault, or my fault, but if he hasn't got hit so hard . . .

Give Ralph a couple, a little bonus, you know . . .

You may never get this money from him.

I don't know whether . . . I don't know where the fuck Nat Roth is going to get it. You can't hit the guy, what do you do with a guy like this?

He is taking a thousand . . .

Hello.

Hey, John . . . hello.

How are you . . .

If he collects a thousand at a time, I told him—

Oh you did? What did you say to him, tell us what happened?

This is the thing, you know . . .

I did what he wanted. He asked me to do it. I did it . . .

[fol. 1002] Well, for a couple of thousand dollars . . .

He has got a hundred and ten thousand dollar bonus . . .

Ralphie, how come you . . .

That is all, that is all . . .

What to do and how to do it . . .

Two hours ago . . .

He will fall out, he will jump out . . .

That is what I warn him not to do, didn't want no publicity.

He doesn't even want to call it a key club, don't you understand? This is the thing, it is an out and out . . .

If I want a thousand at a time . . .

Tell us about the gift shop.

Well, it is a gift shop, you know, in the Club . . .

What would it cost . . .

We are talking about whether we can get it, you know, gifts—

You don't know what they are doing in there?

No, no . . .

Only want to know, approximate . . .

I should break my balls, you know, for what?

(End of Recording.)

Mr. McKenna: There is a conversation now that I am not offering. Start now—3:18.

(Start of Recording:)

I told this guy, you don't understand, I don't care about . . . I don't care about nothing . . .

You can forget me . . . don't forget my number . . . I don't want it . . .

If I have to go hook, bar and seal I will get it . . .

Yeah, that is a joke with everybody, everybody got what they wanted. It is a joke.

Let them pick up what they can and I will pick up what I can, but that man must have that today, that is the word and that is the way it is, and this man ain't going to blow his connections, this man worked too hard for this. Let [fol. 1003] me tell you something, because this was the toughest things you ever encountered. This was almost in the toilet and doing nothing, and I am sitting here and waiting—if I don't hear from you people in the next twenty minutes—

All right, O. K. . . .

Hello.

No good . . . it is wonderful . . .

Not that anybody is trying to screw you, the minute you have got a thing . . .

Twenty minutes to four, you better call . . .

Figures you could be a nice guy, you could be a cock sucker . . . the guy don't want to deliver . . .

That is not bull shit, I mean it. He has got fifteen thousand dollars, because Harry told him, I paid fifteen thousand dollars for the vigorish for a loan . . . he got fourteen thousand dollars worth . . .



What difference does it make if I don't get it, Harry, I blow the whole joint . . .

Listen, what I was telling you . . . he is a wonderful guy . . . so when I say it is going to cost you a couple of thousand dollars extra, because the lawyer, he wants a thousand, do you understand? . . .

I am not so stupid, I never said that in my life, never.

(3:21 P. M.)

(End of recording.)

Mr. McKenna: Now there is some reel left, we begin transcript Number 2, the passage of the money.

The Court: Proceed.

(Start of Recording. 3:35 P. M.)

How are you?

Good morning.

Good Morning.

I am sorry, I am late . . .

What?

[fol. 1004] Make it out to Neyer for 250—two fifty . . .

Make sure you keep Brown in the background for once . . .

So we will get this monkey straightened out. Don't put it on him until you tell him . . .

I pared him down to seven fifty, Frank . . . Neyer, you know, he asked for money. I said: "Look, you are getting seven hundred and fifty dollars, that is it." From two thousand to seven fifty . . .

I told him, "If you do real well, Frank, we will throw in a couple of hundred more," but right now give him seven hundred and fifty, that is your obligation . . .

You have got to give him five hundred cash. I know you don't have it now, but I am going to lay it out for you . . . that is all right, I am going to lay this out for you, I am going to lay this five hundred out for you . . .

I told him seven hundred and fifty is enough for him . . .  
Count it here, anybody can make a mistake. All you have  
to do is keep the fifties— . . .

Is there anything I can do for you today?

Are you all set, got everything?

Yes . . . you can pick up . . .

Ralph, do you think that is big enough to . . .

The only way I can see you can really get your money  
back . . .

I know it is going to Martie, this I know . . .

You got nothing in there . . .

Ralph, you want to get checked by the guys today, or  
do you want to wait . . . he will take you right out . . .

(Sound of humming.)

Where are you going, to the hotel?

I don't know . . .

Are you going to stay here that late?

I don't want to go there until after lunch . . .

More than five years, the first time we have had words . . .

[fol. 1005] Harry; I couldn't help it, couldn't help it . . .

Go across, I go across the street . . .

Hello? Yes? Who is calling? . . .

Harriet? What happened, Harriet . . . well, have a good  
time . . . you need him for something?

All right, hold on . . .

I know Brownie for years . . .

What is the difference? I tell you what I will do . . .

We'll have to stand by for the other one . . .

Chicago, 111 North Wabash Avenue . . .

Hello . . .

How are you? Good . . .

Operator, what are you breaking through? . . .

The reason, George he find him, he give him an extra  
thousand so he wouldn't have to put it up . . .

The hotel here . . . 148 East 48th. I have an office here,  
yes, it is 10 East 48th . . .

Well, this is the first time that I have ever gone through here to get reservations.

Yes, all right . . .

We don't have to put the money up . . .

Hey, George, you want to talk to him, that is your privilege, you know . . .

You want to meet me down there tonight?

What time? . . .

I tell you, I'm only going to my brothers . . . it is a lot of time . . .

We've got to stand by . . . Newark is closer than Idlewild . . . you got to go to 42nd Street . . .

What is the difference, you go from the house to 42nd, and that is a fifty cent cab ride, you will go the terminal.

What about the West Side Terminal . . . oh, I see . . .

But I mean, you got me here . . . he is figuring for a long weekend, Friday, Saturday and Sunday. That is a lot of change.

So what do I do about . . .

[fol. 1006] How do I get . . . o. k. . . . so I will get two hundred . . .

Be sure to be down tomorrow night. We'll get to the old man first, the one who put up the money for the show . . .

You mean Silverman first . . .

They don't want to lose it, they are looking for sixteen hundred a week for eight weeks, or more, you know, but I will get this over . . . I will call you tonight.

Good luck, good luck, Frank . . .

I haven't, but if you need it I will get it . . .

Sixteen hundred . . .

I don't want to start up with him, I am going to lay out the five hundred, I don't want to start up with him.

But, look, I can't help it, I am that way . . .

I mean, I think that the guy should pay . . .

(End of recording. Time 3:50, P.M.)

Mr. McKenna: Do you want to put on 5517?

Mr. McKenna: Your Honor, for the record, this next recording is on Reel 5517. It is a recording of a conversation that occurred on June 9th, 1962, and the time is approximately 4:46 P. M.

(Start of recording:)

Hello, Harold, how are you?

Pretty good, what is new?

What is new with me?

Well, we are getting the grounds . . . I am still in New York and leaving now . . .

Yes, going to call you.

Tomorrow morning, Tuesday morning . . .

What time?

Any time in the afternoon.

How about the morning, how about ten o'clock?

About ten o'clock.

What?

[fol. 1007] Before noon.

O. K. Good enough, right . . .

A thousand dollars, he has got the right to sell . . . in other words he is not supposed to sell . . .

You can't louse up the whole thing . . .

I had to take my wife home.

Pick her up and six o'clock and drive out . . .

I've got five, I've got four, I've got six places . . .

Don't do anything, the last minute stuff . . .

Is that what you want us to do?

The only way I can go to these people and say . . .

That is nothing . . . I helped him . . .

I tell you what I will do . . .

I won't even bother with it.

So what is going to be with it . . .

You had lawyers, the lawyers, tell them . . .

(End of Recording. 4:20 P. M.)

Mr. Brill: Is that the end of that tape?

Mr. McKenna: There is one more conversation.

Mr. Brill: I say, is that the end of that tape, that reel?

Mr. McKenna: End of that conversation.

Mr. Brill: The end of the reel?

Mr. McKenna: There is another conversation on the same tape.

(Start of Recording. 4:30 P. M.)

What time will you be in Monday morning, Ed?

(Interruption of reel—)

Mr. McKenna: This is a conversation of June 29th, 1962, Reel Number 5517, time 5:15 P. M.

(Continuation of recording:)

What time will you be in Monday morning? . . .

All right—I'll be there at 10 o'clock.

Call me on the phone at 10:15, long distance, and I will come back.

All right, Harry.

[fol. 1008] (Humming or singing on tape.)

What are you going to do now?

Let me put it this way, what are you doing?

I found out one thing, there is only one bell to push . . .

I will, Harry, I'll see you at ten o'clock Monday morning . . .

(End of recording. 4:32 P. M.)

Mr. Brill: Apparently, your Honor, all of this is a telephone conversation . . .

The Court: We are adjourned now until tomorrow morning at 11:15.

(Whereupon, the hearing was concluded.)

Reginald C. Mershon, Official Stenographer.

[fol. 1009]

MINUTES BY STENOGRAPHER IRWIN T. SHAW,  
OCTOBER 15, 1964

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK  
Special and Trial Term Part XXXVIII

---

THE PEOPLE,

vs.

RALPH BERGER.

---

New York, October 15th and October 20th, 1964

Before: Hon. Mitchell D. Schweitzer, JSC.

Proceedings Taken in the Courtroom, But Out of the  
Presence of the Members of the Jury, Relating to Tape  
Recordings in the Above-Mentioned Case.

Irwin T. Shaw, Official Stenographer.

Proceedings held *in camera*, during the course of the trial  
of the People of the State of New York v. Ralph Berger,  
held in Part XXXVIII courtroom, Thursday, October 15,  
1964.

The following " . . . " is used to indicate the omission  
of matter, during the playing of the tape, which was  
inaudible and indistinct to this reporter (Irwin T. Shaw).

Mr. McKenna: Reel 5483.

• • • • •



[fol. 1010] (Whereupon, the tape was played, as follows, at 6:23 P. M., as heard by this reporter:

"Good morning.

"Good morning. Sorry I'm late. Traffic.

"Yeah...

"You know, you're all set for the night time.

"More or less.

"More or less. Listen, make out a check.

"Yes. For the 10th.

"Listen.

"What?

"You brought the wrong...

"As long as it's your name on it.

"You have a blank check.

"Yes. Good.

"Make it out to two-fifty.

"Fine."

"Now make sure you keep..."

"Yep.

"So we get this monkey straightened out.

"No, I won't..."

"Right.

"Harry.

"Take it down for seven-fifty. You know, he asked for money. I said, 'Look, you're going to get seven hundred fifty dollars,' and he screamed, 'but that's it.'

"From two thousand to seven-fifty.

"Later on..."

"I told him, 'If you do real well, Frank, we'll throw him a couple of hundred.' But right now give him seven-fifty. That's your obligation.

"Could you make it..."

"No, 250, 250.

"You got to give him five hundred cash. I know you don't have it now, but I'm going to lay that out for you.

"I may have it by Monday."

[fol. 1011] "That's all right. I am going to lay this out for you. I'm going to lay this five hundred out for you. Seven-fifty is enough. Seven-five hundred is the whole figure..."

"Count it while he's here. Anybody can make a mistake..."

"Anything I can do for you today?"

"No, thanks."

"You're all set. Got everything."

"I won't push it now, you know."

"I got just a few things, I mean..."

"You know, you can pick it up."

"Well, you're going to phone the people."

"Yes."

"If you think that's big enough, that setup for five in there..."

"It's the only way to see to get the money back."

"I'm sure it is."

"Now who actually your partners are—now the three of us, actually..."

"Nobody."

"I know."

"Yes, I know..."

"I thought I would give to to Pete."

"After you give it to Pete..."

"But as of now and as of this year it's you, it's me. All right..."

"You want to discuss that with the guys today or you want to wait?"

"What?"

"Oh, yes, yeah..."

(Sound of singing)

"One and two..."

"You write out..."

"Back here on twelve..."

"I'll just leave that bill. O. K."

"Good..."

[fol. 1012] "I mean where you going to the hotel?

"At the hotel.

"See you later.

"Why don't you let me, Ralph . . .

"All right, I'll be here. We're going to stay here that . . .

"I'm going to go there after lunch now.

"Did you make yourself a plane reservation?

"I'll be back in a few minutes.

"Is there anything we can help you now?

"I'm just sorry about the whole thing . . .

"Twenty-five years, it's the first time we had . . .

"Couldn't help us.

"I cried last night. I couldn't take it. The only thing I said, and I meant it from the bottom of my heart, I says, 'I know, Frank, I would go across the street for you. That's the only thing. It wasn't that . . .

"At five minutes to three . . .

"I ran out . . .

"You give it to me.

"Hello.

"Yes.

"Who's calling?

"Harriet? What happened, Harriet? Well, have a good time. You need him for something? All right. Hold on.

"Hello.

"Hello. Huh?

"Couldn't believe it . . . and then not to even hear . . .

"Thank God, he's charged with the money. But you can't depend . . . I know Brownie for years . . .

"Brownie had to be there at eleven-thirty . . .

"What's that?

"The only thing . . .

"Take the bus to Newark. What's the difference? Take the limousine.

[fol. 1013] "Tell you what I'll do. Put me on it, anyway. Put me on the standby . . .

"Yes, for a weekend, 590 to Chicago, sure . . .

"Yes . . .

"Not until he pays off.

"Chicago 111 . . . the only weapon you've got.

"Yeah.

"Hello. Yes, Sal. R. Berger.

"Hey, George, good, how are you?

"Oh, operator, when are you putting me through?

"Very good . . .

No, the reason, George, he claims he gave him a thousand a week so he wouldn't have to . . .

"Now you want my office. You what? Yeah . . .

"I have an office there, yes, at 15 East 48th Street.

"Well, this is the first man that I have gone through to get reservations.

"Yes. All right. Yeah.

"This is not the thing. This is a different thing. We don't have to put the money up. He does.

"Thank you very much.

"Hey, George, you want to talk to him? That's your privilege.

"You wanna meet me down there tonight? What time?

... "Yes. No, I'll tell you, I called up to his mother, to get that bank money. But I don't know how to break it down. Eight hundred.

"Yeah.

"One hundred fifty dollars in dimes. How can I carry it? A lot of dimes, a lot of dimes.

"Are you sure?

"Hello . . . Where will we get the dimes from? Why would I be bringing down dimes? I feel like bringing down dollar bills, not dimes.

"Yeah, yeah.

[fol. 1014] "Yes.

"I get to get . . .

"We got a standby or something . . .

"Two hundred, four hundred . . .

"No, no, . . . that's something else.

"Four o'clock . . .

"Stay there . . .

"Yes, yes, because all I need, I got to go to Newark . . .

"I want to go straight through.

"You're supposed to go to Idlewild. That will cost you . . .

"But I'll be in the hospital. What's the difference? You go from the hospital to forty-second . . . It's a fifty-cent cab drive. You go to the terminal . . .

"Yes.

"No, but I mean you got me here, you got four thousand in change. It's a long weekend. That's a lot of change.

"So what do I do . . .

"What should I get? Eight hundred? O. K., then. All right.

"So I'll get four—two hundred dollars . . .

"Four hundred, he has. O. K. Yes. All right, yeah, yeah.

"I'm going to meet George down there tomorrow night. He's got a guy . . .

"All right, I will be down here . . . But I will get to the old man first. To put up the money for the show. I'll get to Silverman first. They don't want to lose this. They're looking for sixteen hundred a week or more, you know. But I'll get to Silverman.

"This was the understanding, the show . . .

"All right. Thanks, Mike. I'll see you tonight.

"Good luck, Frank.

"I haven't it, but if you need it I'll get it . . .

"I'm going to lay out the five hundred. Ralph, I can't help it. I'm this way. You don't understand. I couldn't get up [fol. 1015] the guts to do it. I just didn't have the guts. I don't know . . .

"Ask him for it.

"If there are any questions . . .

"Yes, I think the guy should pay you.

"I'll pay him the five hundred. It's fifty-five hundred.

"Let's give him fifty, over a hundred, that's all . . ."

Operator of Tape Recorder: Line No. 103.

Mr. Brill: May the record show it's now 6:40, your Honor.

Mr. Brill: It's Reel No. 5517. Is this what you are playing now, Mr. Fieler?

Operator of Tape Recorder: That's what I am putting on.

(Whereupon, the second tape was played as follows, as heard by the Court Reporter):

"Hello, Hal, how are you?

"Pretty good. What's new?

"What's new with me?

"Well, we are trying to get title to the ground. Yes. And what's going to call you...

"Oh, you called me. I'm still in New York. I'm leaving now. Yeah. He said he would call you.

"Yeah.

"Monday morning, Tuesday morning.

"What time?

"Any time in the afternoon.

"How about in the morning? How about ten o'clock.

"About ten o'clock?...

"Before nine? O. K.

"Good enough. Right. All right....

"I was talking to him about...

[fol. 1016] "I have to take out a license, what they call a license, about a thousand dollars...

"What do you mean by a thousand dollars?

"A thousand dollars. You haven't got the right to sell a private key club. What you want to call it. You can call it club. Charge account club. Right...

"In other words, you ain't supposed to sell, you're supposed to sell private. Public can't go there. That's what you're having trouble with now. Right...

"He can't, they won't even...

"Picked me up at six o'clock... four o'clock. I have to go...



"I got five, I got four, I got six . . .

"Ha, ha, ha, ha . . .

"What's the matter with you? Are you stupid? I don't touch anything. It lays right there . . .

"He's been hollering about that. So do anything he wants. In other words, the last minute stuff, this is not done. I'll tell you it will never be done. Never, never. He doesn't know. Look, you don't know . . .

"Hey, he can pick up the money and then they get it later on, or something like that. But the guy does it one way, and he does the same thing. I know he's doing it . . .

"I don't think so, Harry. I tell you we might . . . Let them do it. Wait a minute . . .

"We get eighty percent, they get twenty, the cut . . .

"He wouldn't do it. I know.

"Ha, ha, ha, but he's crazy. You know a way to pick up twenty-five . . .

"Not a thing at all, nothing . . .

"I can't do that. The only way I can go, the only way I can go to these people and say. 'This is what it's going to cost you.' This is the only way. The only thing you can tell them is this—Let me—if they don't, forget it. Harry, the last time—Is that right? . . .

[fol. 1017] "Nothing. He said that. I asked him. Just nothing, and I am going to see . . . I want to find out what the hell is on their mind. I told you . . .

"What have you got to lose?

"I don't know.

"Why is he so worried . . .

"I'll tell you what.

"You don't think so.

"What do you think he's going to get?

"I don't know.

"I wouldn't even bother with him. So what's going to be with Playboy?

"Probably settle with lawyers . . .

"Man, they got a lot to worry about."

(Tape ended at 6:58.)

Tape Recorder Operator: Line No. 207.

Mr. Brill: As I understand it, that was Reel 5517 of the June 29th, 1962, 4:46 conversation.

Is that what it's supposed to be, Mr. McKenna?

This one—excuse me—5517.

Mr. McKenna: Yes, right.

Mr. Brill: I understand that you have another one on the same reel, later in the day, 5:15 P. M.

Mr. McKenna: Yes.

(Whereupon, there was a brief conference off the record between Mr. McKenna and the tape recorder operator.)

Mr. McKenna: (To tape recorder operator): Play it through until you catch it.

Tape Recorder Operator: Line No. 271.

(Whereupon, the next tape was played beginning at 7:05 P. M., as follows, as heard by the Court reporter):

"Now wait, before you go, what time will you be in Monday morning, Ed?

"All right, I'll be there ten o'clock.

[fol.1018] "Ten o'clock. Call me on the phone. Call me on the phone at 10:15. Long distance, when I come back.

"All right, Harry, I'll have to stay over . . .

"I'm waiting for you to do something. Wait. Now I went over there to see—

(Voice singing)

"What's the name of the guy that is doing . . .

"Yes. Yes.

"Sam.

"I don't want him to know me, you know, because.

"Look, what are you doing now?

"What good did it do? Let's put it this way. What does it do?"

"I found out one thing. There's only one bottle of booze . . .

"I will be back, I suppose . . .

"Yeah, sure, we liked him.

"Yeah, not that good.

"Harry, I'll see you ten o'clock Monday morning.

"Yeah. Get some action. Get some action. Will you."

"All right.

"And get busy, will you. All right."

Mr. McKenna: Reel 543. June 28th, '62.

Operator of Tape Recorder: Line 27. Line 22, 23.

Mr. Brill: Very good.

(Whereupon, the tape was played and recorded by the Court Reporter, as heard by him as follows):

"Push you around. How push you around?"

"What do you mean by push you around, going to push you around? Who?"

"Yes, hey . . .

"No. What do you think happened now?"

"The kids got the paper in his hand . . .

"He's on the way up. What are you going to do now? [fol. 1019] "What do you think? You're open, closed—tomorrow night . . .

"He's on his way up. You know . . .

"Yeah, but Frank talked from here to the office. Stay away. I was waiting for Frank but Frank said Brownie's coming over. Heah, but he can't run, you know.

"Well, the most important thing, the kid's got the paper in his hand and he's flying and tomorrow night let's celebrate. All right. I'll be in with my gang, so I'll be talking to you later.

"All right. Oh, sure, yeah, yeah, yeah, We'll talk and I'll give you, you know, the reservations.

"Everything, the whole world . . .

"Take the money with you or don't make the trip.

"Listen, you relax and make yourself at home. You're going to be around here a lot. So relax, you hear, relax . . .

"I might come up with an idea and I will. I just want to get rid of one thing, Ralph, while we're waiting. It's on my mind to get rid of this headache. I got it. Ralph, are you going back tonight, then?

"Probably at midnight.

"On the late plane? Maybe you'll have dinner with Patsy and I.

"You happen to be a very pretty girl, a very pretty girl. Did you ever have any pictures in Toledo at all, Honey? . . .

"Oh, boy, if I don't take a vacation. I was all set to go to Florida for a few days. I was so tired. I never took a vacation in my life. Everywhere I go, I go to Europe three times a year, but it's always business. So last week I said I'm going to Florida. I should be there Friday, Saturday, Sunday. It's wonderful, you know. Thursday morning, I wake up . . . Everybody been to Florida. Never been there . . .

"I tried to talk him out of meeting for lunch . . .

"Unbelieved—she's like a . . . from being around children, people, all the time. Her mother is . . .

[fol. 1020] "The people are in the house all the time. She was on the road, a year and a half travelling with a show. You'd be surprised. It's better than schools for these kids, I'm not kidding you . . .

"Busy tomorrow. Tomorrow is Friday afternoon. Why don't you go to the beach? Fine . . .

"You know, in other words, be there at one o'clock. So I said well, how about Wednesday. She said, 'Wednesday, I'm tied up.' I said, 'Thursday.' Thursday I made arrangements. I got to see her the day she wants. I see her like once a week, you know. We're divorced. I see her once a week. But I got to see her when she wants me. Would you say she's spoiled? . . .

"I give her a fin every week, a lot of money for a kid that age. Such a miser with his money. Nobody can touch this money. Put it away in the bank. Kids go to private school, and every time the kid has a birthday, Mary says when she goes to the store, to buy something for the kid. Afraid to ask why does she spend so much money. It's amazing. But all the kids today are too much—unbelievable . . .

"Let them get out of here. Next week we'll be out of here. He knows what it's for. Do the best that you can. Do it later on, you know. Take it next week then. Who else you're going to see. You don't have to see anybody else. There will probably be none . . .

"It's all taken care of last night. All I wanted was a letter. I said, 'Go and get the girl. Who else can you get but the girl? She's got instructions. She knows what to do . . .

"What do you mean, you know what to do . . .

"One has nothing to do with the other . . .

"Oh, yes, fine, it's been laying open for six months already.

"I told them in no uncertain terms, I said—

"You didn't discuss the money or anything.

"I didn't discuss anything.

[fol. 1021] "I don't know whether you did or not. Don't tell him—Wait a minute. I told them about it before.

"Yeah, but be a nice fellow. They can take the other two-fifty. What the hell's the difference? A thousand.

"You're right, you're not wrong. Ralph, you're right. But let me explain something. Let me explain something. It's not your fault or my fault, but this hasn't got . . .

"But look, they say give Ralph a couple, a little bonus. We may never get this money from them. I don't know where the fuck whoever is going to get it. He can't hit the guy. What do you do with a guy like this?

"You can take a thousand every time.

"Hello, yeah, John. Yeah, Bill. How are you, sir . . .

"I told you . . .

"Collect from that side. If he collects a thousand at a time, see . . .

"Oh, you did, sure . . .

"O. K. The district attorney . . . with the scandal, with the what do you call it . . .

"This is a real bad situation. My sister is very worried . . . so I said—well, she said she didn't know. I left it the way—I did what she wanted me to do, just what she asked me to do. What she asked me to do, I did it . . . Fine. You're going to get it. The district attorney, no threat, muscle . . . It's a bad thing. So everybody gets hurt . . . He's the one who winds up losing his license.

"Hello. The lawyer with a thousand dollars. The guy with two thousand, two thousand more. It's Tony. Do the best you can . . . for a couple of thousand dollars. You know, how this man knew . . . this man, I'm talking about, he's got one hundred ten thousand dollars more . . .

"The money is coming in, that's all. Fifty per cent of the money—fifty per cent. We will decide what to do and how to do it . . .

"Sure, the cocksucker's fault. It's not my fault. You know it . . .

[fol. 1022] "If I had three and a half million dollars in the joint, if I could take this fuckin' thing . . .

"He'll run out, he'll fall out of bed, he'll jump out of bed. They're opening on October 11th. This is what he warned them not to do. He didn't want publicity. He doesn't want to even call it a key club, don't you understand? That's why he said they got him by the neck. It's an out and out on the statute books of the State of New York. You cannot open, you know that, a private key club . . .

"There's something about the gift shop. It's in the law.

"Which law?

"The State of New York. Everybody has it. I understand that. I mean so a lawyer calls up and this is what



he asks him, whether it's a leasing—whether they are holding it—I mean the gift, they own it . . .

"You don't know what they're doing with that. No, no. I think they have given the half million. He would give him the half million if he would give him a decent price. I don't even want to talk to the cocksuckers. Why should I break my balls? For what . . ."

Mr. McKenna: In effect, Mr. Brill, you are hearing this entire tape.

Mr. Brill: Hearing what tape? You can't hear anything.

\* \* \* \* \*

The Court: We will adjourn at this time, gentlemen, to tomorrow morning at 11:15.

Irwin T. Shaw, Official Stenographer.

[fol. 1023]

MINUTES BY STENOGRAPHER SHAW, OCTOBER 20, 1964.

Proceedings held *in camera*, during the course of the trial of the People of the State of New York v. Ralph Berger, held in Part XXXVIII courtroom, Tuesday, October 20, 1964.

The following ". . ." is used to indicate the omission of matter, during the playing of the tape, which was inaudible and indistinct to this reporter (Irwin T. Shaw).

(Tape 5483) (2:55 p. m.)

(Whereupon, the tape was played, at 2:55 p. m., as follows, as heard by this reporter:

"The whole world . . .

"Just relax, relax, relax . . .

"You are going back tonight then. Have you made plans . . .

"Boy, if I don't take a vacation soon. I was all set to go to Florida. I was too tired. I never took a vacation in my life.

"Going to Florida. Wonderful.

"Did you ever go to Florida.

"No. You never been there . . .

"From being around sick people all the time, and her mother—people are in the house all the time . . . on the road a year and a half traveling with a show.

"I got to do what she wants. I see her once a week, but I got to see her when she wants. Would you say she's spoiled? . . .

"She's got instructions. She knows what to do . . .

"You know what to do . . .

"What's the difference? I told him . . .

"Yes, but I'm going to be a nice fellow now. What the hell's the difference.

"You're right. Ralph, you're right. Let me explain it to you. Let me explain it to you. It's not your fault and my fault . . .

"What do you do with it? . . .

[fol. 1024] "Hello. Yeah, John. Yeah, Bill, how are you, sir? Yes. That's right.

"If it costs a thousand, I told him fifty.

"You did.

"Sure.

"It's what I did, that's all. O. K. Tell us what happened, this is the thing . . .

"After all, it's a big . . .

"Very worried . . .

"I did what you wanted. He asked me to do it. I did it . . .

"You warned them not to do . . .

"Doesn't even want to call it a key club, don't you understand? It's an out and out . . .

"This is the way he explained to me. You should have come out openly, a private club . . .

"What are you talking about? About the gift shop . . . with the law in New York . . . I understand that . . .

"We're talking about . . . where there's a leak in it, a hole in it . . . we don't know what to do.

"No, I didn't question him, offering him a half a million . . . give him half a million.

"Why should I break my balls, you know. For what?"

Mr. McKenna: There's a conversation now that I am not offering. I am just playing it for Mr. Brill. (Tape ends at 3:12)

(Whereupon at 3:15 p. m. a tape was further played as follows, as heard by this reporter:

"You don't know this man. I don't care about Brown . . . you don't understand . . .

"No, at one time because . . .

"And if I got to hook, beg or steal, I'll get it. It's a joke. Everybody's got what they want. It's a joke . . .

"Well, I will have to order it. Let them pick up what they can and I will pick up what I can, but that man must have that today. That's the word and that's the way it is, [fol. 1025] and this man . . . This man worked too hard for this, let me tell you something, because this was the toughest thing. This was almost . . . and I'm sitting here waiting for him, and if I don't hear something from you people in one minute. All right. O. K. . . .

"Hello . . . No good. It's wonderful . . .

"When the guy is down, you do everything in the world . . .

"He could have been a nice man . . .

"I swear to you it's worth fifty thousand dollars, and I'm not bullshitting. This costs fifteen thousand, because when a man . . . I pay fifteen thousand dollars for a loan. He got fifteen thousand. Now what's in it for me? If I don't get it, Harry, I blow the whole gong . . . Sure, a wonderful guy. If you are going to milk . . . it's going to cost a couple of thousand extra because the lawyers, because they want another thousand . . .

"I never did that in my life—never . . .

(Tape ends at 3:22 p. m.)

Mr. McKenna: Now there is some reel left before we begin Transcript No. 2, the passage of the money.

Does Mr. Brill want to listen to that for the question of authenticity?

I am perfectly willing to play it.

All right.

The Court: For the record, are you playing Reel No. 5483 next?

Mr. McKenna: That's right.

The Court: Let's proceed.

Mr. Brill:

Mr. McKenna's offer may be generous, and I don't want to be in a position to question any statement that he makes. [fol. 1026] But I am afraid that I am obliged to insist upon proof of the matters with respect to these offers, rather than a representation or a statement, inasmuch as Mr. McKenna was not present on the taking of these, and I don't believe he will suggest that he was.

(Whereupon, the tape, above referred to, was played at 3:33 p. m., as follows, as heard by this reporter:

"Yes . . .

"You are all set for the night time.

"More or less . . .

"Make out a check for the ten.

"What? . . .

"Make it out to Neyer for two fifty . . .

"Until we keep this monkey straightened out . . .

"You tell him . . .

"I cut him down to seven-fifty. Frank, Neyer. You know he asked for money. I said look . . . this is trouble. Fifty dollars, but this is it—two thousand is very good . . .

"I told him if you do real well, Frank, you'll draw a couple of hundred extra. But right now I give him seven-fifty.

"He can make seven-fifty.

"No, two-fifty, two-fifty.

"Two-fifty. You got to give him five hundred. But I am going to lay that out for you. I'm going to lay this five hundred out for you. Seven-fifty is enough . . .

"Anything I can do for you today? Yes . . .

"You're all set. You got everything now.

"Yes.

"All right . . .

"Ralph, you think that's big enough . . .

"Ralph, you want to discuss that with the guy today. You want to wait . . .

"O. K. Yes.

"Where? My car . . .

[fol. 1027] "Where you going? To the hotel?

"I don't know . . .

"I won't go there until after lunch there.

"They're ready. Don't worry . . .

"Five years, the first time we've had words . . .

"The only thing I said, and I meant it from the bottom of my heart, I said . . .

"Five minutes to three.

"Hello, yes.

"Yeah, who's calling?

"Harriet.

"What happened, Harriet?

"Well, have a good time. You need him for something?

All right. Hold on.

"Hello.

"Hello.

"Huh . . .

"I must have made forty, fifty calls to Chicago. My phone . . .

"Harry, I know Brownie for years . . .

"Hello. What's that? . . .

"I don't want . . .

"The only thing we got . . .

"What's the difference? . . .

"All right, tell you what I'll do. Put you on the standby for the other one . . .

"Yeah, yeah . . .

"Hello. Yes.

"Hello, George. Good. How are you? . . .

"Hello. The reason we gave him a thousand a week . . .

"You what? . . .

"The hotel here is at 148 East 48th Street. I have an office there. Yes, 15 East 48th Street.

"Well, this is the first time that I have gone through this to make a reservation.

"Yeah, all right, yeah . . .

[fol. 1028] "We don't have to put the money up. He does . . .

"George, you want to talk to him, it's your privilege, you know . . .

"You wanna meet me down there tonight or . . .

"Yeah . . .

"I'll tell you . . .

"Yeah . . .

"Let's go . . .

"Wait a minute . . .

"A lot of dimes . . .

"Hello. What do we need dimes for? . . .

"Yeah, yeah . . .

"You got a standby or something . . .

"How about Northwest? . . .

"Supposed to go to Idlewild. Take a taxi. You know you can go to 42nd Street . . .

"What's the difference? You go to 42nd Street. It's a fifty-cent cab . . . You go to the terminal . . .

"But I mean you got four thousand . . . along with them. What do I do about . . .



"O. K. Yeah. All right. Yeah. Yeah, yeah.

"I'm going to meet George down there tomorrow night . . .

"They are looking for six hundred a week for eight weeks or more, you know . . .

"I'll see you tonight. Good luck, Frank . . .

"I have it, but if you need it I'll get it . . .

"I didn't want to start up with him. I didn't want to start up . . .

"Ralph, I can't help it. You don't understand. I couldn't get up the guts to do it. I just didn't have the guts. I don't know . . .

"I was going to ask him for it . . .

(Whereupon, the tape playing concluded at 3:25 p. m.)

Mr. McKenna: Do you want to put on 5517?

[fol. 1029] Mr. McKenna: For the record, this next recording is on Reel 5517. It's a recording of a conversation that occurs on June 29th, 1962, and the time is approximately 4:46 p. m.

(Whereupon, at 4:10 p. m., Tape Reel No. 5517 was played, as follows, as heard by this reporter (Irwin T. Shaw):

"Hello, Al, how are you?

"Pretty good. What's new? What's new with me . . .

"I'm still in New York. I'm leaving now.

"Yeah . . .

"Yep, Monday morning. Tuesday morning. What time?

"Any time in the afternoon.

"How about the morning? How about ten o'clock?

"About ten o'clock . . .

"O. K. Good enough. Right. All right . . .

"Not supposed to sell private . . .

"I had to take my wife home . . .

"Six o'clock . . .

"What?

"Airport . . . Four o'clock I've got to go over here, Newark . . .

"What's the matter with you, you stupid . . .

"Right there . . . Don't do anything . . .

"He doesn't know . . .

"He does the same thing . . .

"Are you crazy? . . .

"Had a special conference with him . . .

"The only way I can go to these people and say this is . . .

"The only thing you can tell them is this . . .

"Well, I don't know what to do . . .

"I'll tell you what I'll do . . .

(Whereupon, the tape playing concluded at 4:25 p. m.)

Mr. Brill: Is that the end of that tape?

[fol. 1030] Mr. McKenna: No. There's one more conversation.

Mr. Brill: Pardon?

Mr. McKenna: There's one more conversation.

Mr. Brill: No. Is that the end of that tape on Reel 5517?

Mr. McKenna: It's the end of that conversation.

There's another conversation on the same tape.

This is a conversation of June 29th, 1962, Reel No. 5517.

The time is 5:15 p. m.

(Whereupon, Tape Reel 5517 was played, as follows, as heard by this reporter, the playing commencing at 4:28 p. m.):

"I'm going to—What time will you be in Monday morning?

"I'll be there ten o'clock.

"Ten o'clock. Call me on the phone. Call me on the phone at ten-fifteen.

"And I'll come back. All right, Harry . . .

(Sounds of singing)

"Let's put it this way. What will it do? I found out one thing. There's only one . . .

"I'll see you ten o'clock, Monday morning.

"All right, about a quarter to . . .

(Whereupon, the playing of the tape concluded at 4:30 p. m.)

Mr. Brill: Apparently, your Honor, all of this is a telephone conversation, . . .

The Court: We will adjourn now until tomorrow at eleven-fifteen.

(Whereupon, the hearing was concluded; and an adjournment was taken.)

Irwin T. Shaw  
Official Stenographer

---

[fol. 1031]      STATEMENT AS TO OPINION

No opinion was rendered by the Trial Court herein.

[fol. 1033]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

RALPH BERGER, Defendant-Appellant.

NOTICE OF APPEAL TO COURT OF APPEALS—April 7, 1966

Sirs:

Please Take Notice, that pursuant to permission granted by an order of Honorable Stanley H. Fuld, Associate Judge of the Court of Appeals, made on the 7th day of April, 1966, the defendant-appellant above-named hereby appeals to the Court of Appeals from an order and judgment of the Appellate Division, First Judicial Department, made and entered on the 17th day of March, 1966 unanimously affirming the judgment of the Supreme Court of the State of New York, County of New York, convicting defendant-appellant of the crime of conspiracy, Section 580 Penal Law, which said judgment of conviction was entered in the office of [fol. 1034] the Clerk of said county on the 7th day of December, 1964 and from each and every part of said order and judgment.

Dated: New York, N. Y., April 7, 1966.

Yours, etc.,

Joseph E. Brill, Attorney for Defendant-Appellant,  
Office & P. O. Address, 165 Broadway, New York,  
N. Y. 10006, BE 3-6150.

To: Frank S. Hogan, Esq., District Attorney, New York  
County.

To: Clerk of the Supreme Court of the State of New  
York, County of New York.

[fol. 1035]

COURT OF APPEALS  
STATE OF NEW YORK

Before: Hon. Stanley H. Fuld, Associate Judge.

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,  
against  
RALPH BERGER, Defendant-Appellant.

---

CERTIFICATE GRANTING LEAVE TO APPEAL TO  
COURT OF APPEALS—April 7, 1966

I, Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

I further certify that in my opinion there is reasonable doubt whether the judgment of conviction will stand upon appeal to the Court of Appeals.

Bail as at present provided is fixed pending appeal to the Court of Appeals in the sum of \$7,500.

Dated at New York, New York, April 7, 1966.

Stanley H. Fuld, Associate Judge.

[fol. 1036]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 17th day of March, 1966.

Present: Hon. Bernard Botein, Presiding Justice. Hon. James B. M. McNally, Hon. Samuel W. Eager, Hon. Ellis J. Stanley, Jr., Justices.

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,  
against

RALPH BERGER, Defendant-Appellant.

---

ORDER OF AFFIRMANCE—March 17, 1966

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on the 7th day of December, 1964, convicting defendant of two counts of conspiracy to bribe a public official (Section 580, Penal Law), and said appeal having been argued by Mr. Joseph Brill, of counsel for the appellant, and by Mr. Jeremiah B. McKenna, of counsel for the respondent; and due deliberation having [fol. 1037] been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

Hyman W. Gamso, Clerk.

---

STATEMENT AS TO OPINION

No opinion was rendered by the Appellate Division—First Department, in making the order of affirmance appealed from herein.



[fol. 1038]

COURT OF APPEALS  
STATE OF NEW YORK  
Indictment No. 1402/1963

---

THE PEOPLE OF THE STATE OF  
NEW YORK, Plaintiffs-Respondents,

*against*

RALPH BERGER, Defendant-Appellant.

---

CERTIFICATE OF REASONABLE DOUBT AND  
PEOPLE'S EXHIBITS 1 AND 2

(For the convenience of the Court)

---

JOSEPH E. BRILL,  
Attorney for Defendant-Appellant,  
165 Broadway,  
New York, N. Y.

BE 3-6150

[fol. 1040]

CERTIFICATE OF REASONABLE DOUBT

[Omissions in the following are items in our proposed  
certificate which Mr. Justice Greenberg eliminated.]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

---

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,  
*against*  
RALPH BERGER, Defendant.

---

I, Henry Clay Greenberg, Justice of the Supreme Court of the State of New York, before whom an application was made for a Certificate of Reasonable Doubt at Special Term, Part 1 on the 9 day of December, 1964 by Ralph Berger, the above named defendant who was convicted of the crimes of conspiracy in violation of § 580 of the Penal Law in the Supreme Court of the State of New York, County of New York on an indictment charging him with said crimes, do hereby certify that in my opinion there is reasonable doubt whether said judgment of conviction should stand.

[fol. 1041] My reason for such opinion and the questions which I deem of sufficient importance for a review by the Appellate Division are as follows:

1. \* \* \* \* \*

2. Whether the Trial Court committed prejudicial error by admitting into evidence Exhibit 61-A, a tape recording and in not suppressing said Exhibit which was made as a result of a trespassory invasion of a constitutionally protected area in violation of constitutional rights of privacy, due process and the right to be free from self incrimination and unlawful searches and seizures. Whether the Trial Court committed prejudicial error in admitting said tape in evidence though it was so inaudible, unintelligible, full of gaps and blank spaces that it was utterly

without probative value. Whether the Trial Court committed prejudicial error in admitting Exhibits 62 and 63, alleged transcripts of Exhibit 61-A, prepared by the District Attorney and in not making provision for the use of earphones by persons attendant on the trial.

3. . . . .

4. Whether the Trial Court committed prejudicial error in permitting the prosecution to offer in evidence proof that its witnesses, alleged co-conspirators of defendant, had asserted their constitutional privilege against self incrimination before the Grand Jury.

5. . . . .

6. . . . .

7.-12. . . . .

13. Whether the Trial Court committed prejudicial error in not suppressing People's Exhibits 56 and 57 on the [fol. 1042] ground that they were illegally obtained from defendant and it further fell in error in striking out defendant's Exhibit P and the cross-examination of People's witness with respect to the circumstances under which People's Exhibits 56 and 57 were obtained.

Dated: New York, New York, December 9, 1964.

H. C. G., Justice of the Supreme Court of the State of New York.

PEOPLE'S EXHIBIT 1  
*Order of Mr. Justice Sarafite*  
COURT OF GENERAL SESSIONS  
COUNTY OF NEW YORK  
—  
IN THE MATTER

*of*

Overhearing Conversations Taking Place  
in Room 1001 at 22 West 48th Street.

It appearing from the affidavits of Jeremiah B. McKenna and Alfred J. Scotti, Assistant District Attorneys of the County of New York, sworn to on April 5th, 1962, that there is reasonable ground to believe that evidence of crime [fol. 1043] may be obtained by overhearing and recording the conversations, communications and discussions that may take place in Room 1001 at 22 West 48th Street, in the County, City and State of New York; and the Court being satisfied as to the existence of said reasonable grounds, it is

ORDERED, that the District Attorney of the County of New York, or any police officer acting under the direction of the District Attorney, or other agent acting under the direction of the District Attorney be, and hereby is, authorized and empowered to overhear and record by means of any instrument, any and all conversations, communications and discussions that may take place between persons present in the abovementioned room; and to do all things necessary to permit said conversations, communications and discussions to be overheard and recorded; and it is further

ORDERED, that this order shall be effective until and including June 9th, 1962.

Dated, New York, N. Y., April 13th, 1962.

s/ JOSEPH A. SARAFITE  
Joseph A. Sarafite

without probative value. Whether the Trial Court committed prejudicial error in admitting Exhibits 62 and 63, alleged transcripts of Exhibit 61-A, prepared by the District Attorney and in not making provision for the use of earphones by persons attendant on the trial.

3. . . . .

4. Whether the Trial Court committed prejudicial error in permitting the prosecution to offer in evidence proof that its witnesses, alleged co-conspirators of defendant, had asserted their constitutional privilege against self incrimination before the Grand Jury.

5. . . . .

6. . . . .

7.-12. . . . .

13. Whether the Trial Court committed prejudicial error in not suppressing People's Exhibits 56 and 57 on the [fol. 1042] ground that they were illegally obtained from defendant and it further fell in error in striking out defendant's Exhibit P and the cross-examination of People's witness with respect to the circumstances under which People's Exhibits 56 and 57 were obtained.

Dated: New York, New York, December 9, 1964.

H. C. G., Justice of the Supreme Court of the State of New York.

This office presently has evidence that one of the attorneys who acts as the conduit for these bribes or extortion [fol. 1045] payments is Harry Neyer, located in Room 1001, in the premises 22 West 48th Street, County, City and State of New York. Harry Neyer was a former employee of the New York State Liquor Authority. According to the information in the possession of this office, other attorneys or applicant licensees must retain Harry Neyer to contact the Liquor Authority on their behalf and carry the bribe or extortion money from them to the Commissioners involved.

In view of the foregoing, there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in the abovementioned room.

WHEREFORE, I respectfully request an order authorizing and empowering the District Attorney of the County of New York, or any police officer or other agent acting under the direction of the District Attorney, to overhear and record, by means of any instrument, any and all conversations, communications and discussions that may take place between persons present in the aforesaid offices; and to do all things necessary to permit said conversations, communications and discussions to be overheard and recorded.

I further respectfully request that this order be made effective until and including June 9th, 1962.

No previous application has been made to any judge or court for the order herein requested.

S/ JEREMIAH B. McKENNA

Sworn to before me this  
5th day of April, 1962.

S/ ALFRED BROWN

ALFRED BROWN

Notary Public, State of New York

No. 31-0441725

Qualified in New York County

Commission Expires March 30, 1963



[fol. 1046]

*Affidavit of Alfred J. Scotti*  
**COURT OF GENERAL SESSIONS,**  
**COUNTY OF NEW YORK.**

—  
**IN THE MATTER**

*of*

**Overhearing Conversations Taking Place  
 in Room 1001 at 22 West 48th Street.**

**STATE OF NEW YORK**  
**COUNTY OF NEW YORK** } ss.:

**ALFRED J. SCOTTI**, being duly sworn, deposes and says:

I am an Assistant District Attorney in and for the County of New York, assigned as Chief of the Rackets Bureau of the District Attorney's Office, and as such make this affidavit.

I have read the annexed affidavit of Assistant District Attorney Jeremiah B. McKenna, verified April 5th, 1962.

Based upon the facts set forth in Mr. McKenna's affidavit, I respectfully state to the Court my opinion that there is reasonable ground to believe that evidence of crime may be obtained by overhearing the conversations, communications and discussions that may take place in the above set forth room.

s/ **ALFRED J. SCOTTI**  
**Alfred J. Scotti**

Sworn to before me this  
 5th day of April, 1962.

s/ **ALFRED BROWN**

**ALFRED BROWN**

Notary Public, State of New York  
 No. 31-0441725

Qualified in New York County  
 Commission Expires March 30, 1963

[fol. 1047]

## PEOPLE'S EXHIBIT 2.

*Order of Mr. Justice Sarafite*

COURT OF GENERAL SESSIONS,

COUNTY OF NEW YORK.

IN THE MATTER

of

Overhearing Conversations Taking Place  
in Room 801 at 15 East 48th Street.

It appearing from the affidavits of David A. Goldstein and Alfred J. Scotti, Assistant District Attorneys of the County of New York, sworn to on June 11, 1962, that there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in Room 801 located at 15 East 48th Street, in the County, City and State of New York; and the Court being satisfied as to the existence of said reasonable grounds, it is

ORDERED, that the District Attorney of the County of New York, or any police officer acting under the direction of the District Attorney, or other agent acting under the direction of the District Attorney be, and hereby is, authorized and empowered to overhear and record, by means of any instrument, any and all conversations, communications and discussions that may take place in the abovementioned room; and it is further

ORDERED, that this order shall be effective until and including August 11, 1962.

Dated, New York, N. Y., June 12, 1962.

s/ JOSEPH A. SARAFITE

Joseph A. Sarafite

Judge of the Court of General Sessions

[fol. 1048]

*Affidavit of David A. Goldstein*  
**COURT OF GENERAL SESSIONS,**  
**COUNTY OF NEW YORK.**

—  
**IN THE MATTER**

*of*

**Overhearing Conversations Taking Place  
 in Room 801 at 15 East 48th Street.**

**STATE OF NEW YORK** }  
**COUNTY OF NEW YORK** } ss.:

**DAVID A. GOLDSTEIN**, being duly sworn, deposes and says:

I am an Assistant District Attorney of the County of New York, assigned to the Rackets Bureau of the District Attorney's Office.

This office is presently conducting an investigation into alleged official corruption centered about the State Liquor Authority, which involves the alleged crimes of conspiracy, bribery, coercion, extortion and the taking of unlawful fees.

This office has received information that persons desiring to obtain, or possessing liquor licenses, are required to pay large sums of money to acquire these licenses or remove any violations therefrom.

This office has obtained evidence that a conspiracy exists among a group of attorneys in the City of New York, in league with public officials in the New York State Liquor Authority, the agency which issues liquor licenses, to require liquor license applicants to retain certain attorneys [fol. 1049] and pay large sums of money to them in the form of purported legal fees, which are then transmitted by the said attorneys to the said public officials in the New York State Liquor Authority. In return for the payment of said monies, the liquor licenses are granted.

This office presently has evidence that one of the attorneys who acts as a conduit for these bribes or extortion payments is Harry Neyer, Esq. who maintains an office at 22 West 48th Street, New York County. Said Neyer is a former employee of the New York State Liquor Authority. According to the information in the possession of this office, other attorneys or applicant licensees must retain said Harry Neyer to contact the State Liquor Authority on their behalf and carry the bribe or extortion money from them to the officials involved.

In the course of this investigation, over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer, evidence has been obtained that conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman, located in Room 801 at 15 East 48th Street, in the County, City and State of New York.

Harry Steinman, a prospective liquor license applicant, is a former owner of the Latin Casino, a nightclub in Philadelphia, Pennsylvania, and is president of Moma Goldberg Liquor East Inc., the corporate owner of Moma Goldberg nightclub in the City, County and State of New York.

The evidence indicates that the said Harry Steinman has agreed to pay, through the aforesaid Harry Neyer, \$30,000 to a public official or officials in the New York State Liquor Authority to secure a liquor license for the Palladium Ballroom, 1698 Broadway, City, County and State of New York, which premises was the subject of hearings before the State Liquor Authority because of narcotic arrests therein.

[fol. 1050] In view of the foregoing, there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in the office of Harry Steinman which is located in Room 801 at 15 East 48th Street, New York County.

WHEREFORE, I respectfully request an order authorizing and empowering the District Attorney of New York County, or any police officer or other agent acting under the direction of the District Attorney, to overhear and record, by means of any instrument, any and all conversations, communications and discussions that may take place in the above-mentioned room.

I further respectfully request that this order be made effective until and including August 11, 1962.

No previous application has been made to any judge or court for the order herein requested.

/s/ DAVID A. GOLDSTEIN.

Sworn to before me this  
11th day of June, 1962.

/s/ JONAS E. LAMPACH,  
JONAS E. LAMPACH,

Notary Public, State of New York.

No. 03-2240625.

Qualified in Bronx County.

Certificate Filed in New York County.

Commission Expires March 30, 1963.

[fol. 1051]

*Affidavit of Alfred J. Scotti.*

## COURT OF GENERAL SESSIONS,

COUNTY OF NEW YORK.

IN THE MATTER

of

Overhearing Conversations Taking Place  
in Room 801 at 15 East 48th Street.STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

ALFRED J. SCOTTI, being duly sworn, deposes and says:

I am an Assistant District Attorney in and for the County of New York, assigned as Chief of the Rackets Bureau of the District Attorney's Office and, as such, make this affidavit.

I have read the annexed affidavit of Assistant District Attorney David A. Goldstein, verified June 11th, 1962.

Based upon the facts set forth in Mr. Goldstein's affidavit, I respectfully state to the Court my opinion that there is reasonable ground to believe that evidence of crime may be obtained by overhearing the conversations, communications and discussions that may take place in the above set forth premises.

/s/ ALFRED J. SCOTTI.

Sworn to before me this  
11th day of June, 1962.

/s/ JONAS E. LAMPACH,  
JONAS E. LAMPACH,

Notary Public, State of New York.

No. 03-2240625.

Qualified in Bronx County.

Certificate Filed in New York County.

Commission Expires March 30, 1963.



[fol. 1052]  
No. 250

FILED

Jul 18 1966

SUPREME COURT  
NEW YORK COUNTY  
APPEAL BUREAU  
COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND,  
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR July 7, 1966.

[fol. 1053]

1,

No. 250.

66

THE PEOPLE &C.,

Respondent,

vs.

RALPH BERGER,

Appellant.

BE IT REMEMBERED, That on the 20th day of May in the year of our Lord one thousand nine hundred and sixty-six, Ralph Berger, the appellant- in this cause, came here unto the Court of Appeals, by Joseph E. Brill, his attorney-, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Divi-

sion of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent- in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 1054] WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joseph E. Brill, of counsel for the appellant-, and by Mr. H. Richard Uviller, of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 1055] THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON  
*Clerk of the Court of Appeals of  
 the State of New York.*

Court of Appeals, Clerk's Office,  
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON  
Clerk.

[fol. 1056]

---

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

RALPH BERGER, Appellant.

---

Decided July 7, 1966.

Judgment affirmed; no opinion.

Concur: Judges Van Voorhis, Burke, Scileppi, Bergan and Keating. Chief Judge Desmond and Judge Fuld dissent and vote to reverse on the ground that the electronic eavesdrops inside two offices, one of which was a law office, were unconstitutional under the Fourth Amendment and a physical intrusion into private premises and as a "general search" for evidence. (See *Siegel v. People*, 16 N Y 2d 330, 333, per Desmond, Ch. J. [dissenting]; *People v. McCall*, 17 N Y 2d 152, 161, per Desmond, Ch. J. [concurring]; *People v. Grossman*, 45 Misc 2d 557; cf. *Stanford v. Texas*, 379 U. S. 476; *Silverman v. United States*, 365 U. S. 505.)

[fol. 1057] Triple Certificate to foregoing paper (omitted in printing).

[fol. 1058] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol 1059]

## SUPREME COURT OF THE UNITED STATES

No. 615—October Term, 1966

---

RALPH BERGER, Petitioner,

v.

NEW YORK.

---

## ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Assuming the basic Federal Fourth and Fifth Amendment constitutionality of New York State's permissive eavesdrop legislation which allows electronic room eavesdropping or 'bugging' by ex parte Court order (N.Y. Code Crim. Proc. § 813-a), where the ex parte Court orders for the room eavesdrops in this particular case without which this prosecution stipulatedly could not have been instituted or maintained, nevertheless invalid under the Fourth Amendment because not based upon an adequate showing of probable cause?

"2. Is the New York ex parte permissive eavesdrop legislation (N.Y. Code Crim. Proc. § 813-a) unconstitutional under the Federal Fourth, Fifth and Fourteenth Amendments as setting up a system which intrinsically involves trespassory intrusion into private premises, 'general' [fol 1060] searches for 'mere evidence' and invasion of the privilege against self incrimination; and were the particular room eavesdrops here involved unconstitutional on those grounds?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.